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CAUSE NO. A - 812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

HARRY GRAHAM AND ELLEN GRAHAM

PETITIONERS

VS.

STATE OF INDIANA

RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF INDIANA; ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

APPEARING pro se

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I

QUESTIONS PRESENTED FOR REVIEW

Comes now Harry Graham pro se and Ellen Graham pro se in the above captioned cause, and respectfully petition this Most Honorable Court to review the judgments in this cause by means of the Writ of Certiorari.

Questions:

1. Was the Indiana Medical Licensing Law unconstitutional I.C. 25.22. Which defines the practice of medicine and was used to convict the petitioners on all three charges?

I. Involuntary Manslaughter, I.C. 35-42-1-4 (1), (3)

II. Reckless Homicide, I.C. 35-42-1-5

III. Practice of medicine without a license I.C. 25-22.5

2. Was the search warrant unconstitutional that was used for searching the petitioners' premises and seizing their pro-

perty on September 30, 1983?

3. Was petitioners' counsel's use of the word "Variance" sufficient to reject the evidence?

4. Was it lawful for blatantly prejudicial evidence to be admitted when it was plain error?

5. Was "Involuntary Manslaughter" and "Reckless Homicide" Constitutionally defined by Honorable Robert Barnett, the trial court judge?

6. Why should not Ellen Graham have been exonerated for all her acts because of the exception in the Indiana Medical Licensing Law for Registered Nurses and the duties assigned to nurses and permitted to nurses under the Indiana Nurse Licensing Law?

7. Were the religious "First Amendment" Rights of the petitioners violated in this cause?

8. Were other common law and constitutional Rights of the petitioners violated?

9. Were the petitioners subjected to "Double Jeopardy"?

10. Should an autopsy have been performed upon Sybil Bennett?

11. Does the Medical Licensing Law I.C. 25-22.5 violate the "Sherman Anti-Trust Act"?

12. Would any or all of the above reasons be sufficient to reverse the decisions of the lower courts?

II

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGEMENT IS SOUGHT TO BE REVIEWED:

1. Honorable Robert Barnett, Judge of Superior Court No. 1, Delaware County, Indiana.
2. Honorable J. Neal, Justice, Indiana Court of Appeals No. 1.
3. Honorable J. Robertson, Justice, Indiana Court of Appeals No.1.
4. Honorable P.J. Ratliff, Justice, Indiana Court of Appeals No. 1.
5. Honorable Richard M. Givan, Chief Justice, Indiana Supreme Court.
6. Honorable Roger O. DeBruler, Justice, Indiana Supreme Court.
7. Honorable Alfred J. Pavarnik, Justice, Indiana Supreme Court.
8. Honorable Dixon W. Prentice, Justice, Indiana Supreme Court.

9. Honorable Randall Shepard, Justice,
Indiana Supreme Ccurt.

10. Michael Alexander
Prosecuting Attorney
Delaware County, Indiana

11. Linley Pearson
Attorney General
State of Indiana
State House
Indianapolis, Indiana

12. Governor Robert D. Orr
State of Indiana
State House
Indianapolis, Indiana

TABLE OF CONTENTS

		Page
I.	Questions Presented for Review.	1
II.	List of all Parties to the Proceeding in the Court Whose Judgement is Sought.	3,3a
	TABLE OF CONTENTS.	3b
	TABLE OF AUTHORITIES.	3c, 3d,e
III.	Reference to Official and Unofficial.	
	Reports of any Opinions Delivered by the Courts.	4
V.	The constitutional Provisions, Statutes, Ordinances and Regulations which this Case involves.	5
VI.	Concise Statement of the Case.	7
VII.	Argument.	20

TABLE OF AUTHORITIES

CASES	Page
Andrews v. Ballard, (1980) 498 F. Supp. 1046-1051.	44
Bassemier v. Sartore, (1964) Ind. App., 201 N.E.2d 285.	31
Calley v. Callaway, (1974) 382 F. Supp. 650.	50
Candler v. State, (1970) 266 Ind. 440, 363 N.E.2d 1233.	30
Davis v. State, (1976) 265 Ind. 476, 355 N.E.2d 836.	36
England v. Louisiana State Board of Medical Examiners, 259 F. 2d 626, 627.	26
Gibbs v. State, (1981) Ind. App., 426 N.E.2d 1150.	34
Grayned v. City of Rockford, (1972) 408 U.S. 104, 92 S. Ct. 2294, 33 L.Ed. 2d 222.	22
Grody v. State, (1972) 257 Ind., 651, 278 N.E.2d 280.	22
Hammer v. State, (1976) Ind. 354 N.E.2d 170.	30
Harrington v. State, (1980) Ind., 413 N.E.2d 622, trans. denied. . .	36
Hendrick v. State, (1950) 299 Ind. 381, 98 N.E.2d 906.	36
Hicks v. State, (1938) 213 Ind. 277, 11 N.E.2d 171.	35

TABLE OF AUTHORITIES

CASES	Page
Hoxey v. Fishbein, (1949) 83 F. Supp. 282, at 284.	43
Illinois v. Gates, (1983) ___U.S. ___103 S.Ct. 2317, 76 L.Ed.2d 527.	28
McClain v. State, (1980) Ind., 410 N.E.2d 1297.	29
Meredith v. State, (1982) Ind. App., 439 N.E.2d 204.	32
Miller v. State, (1975) 263 Ind. 595, 335 N.E.2d 206.	34
Moore v. State, (1982) Ind., 440 N.E.2d 1092.	32
Newton v. State, (1984) Ind. App., 460 N.E.2d 1266.	32
Nova Records, Inc., v. Sendak, (1980) 504 F.Supp. 938, aff'd 706 F.Supp. 792.	22
Reed v. State, (1979) 180 Ind. App. 5, 387 N.E.2d 82.	34
Rowley v. State, (1982) Ind., 442 N.E.2d 343.	32
State v. Kelsey, (1975) 163 Ind. App. 543, 325 N.E.2d 218.	34
Terry v. State of Ohio, (1968) 88 S.Ct. 1868, 393 U.S. 1.	43
Wahl v. State, (1951) 229 Ind. 521, 98 N.E.2d 671.	35

MISCELLANEOUS

	Page
United States Constitutional Amendments.	5
Constitution of Indiana, Article No. 1.	42
Indiana Appellate Rule 11-B-(8). .	5
Indiana Appellate Rule 17-1-(b). .	5

STATUTES

I.C. 25-22.5-1-1.1(a).	20,23
I.C. 25-22.5-8-4.	26
I.C. 35-33-5-2.	27
I.C. 25-22.5-1-2(k).	38,53
I.C. 25-23-1-1-(b)-4.	38,53
I.C. 35-42-1-4, 5.	4

AUTHORS

E.G. White.	41,42

III

OPINIONS DELIVERED BY THE COURTS

The petitioners were convicted on 3 counts by the Superior Court No. 1 of Delaware County, Indiana. Count No. 1 - Involuntary Manslaughter I.C. 35-42-1-4; Count No. 2 - Reckless Homicide I.C 35-42-1-5; and Count No. 3 - Unlawful Practice of Medicine I.C. 25-22.5-8-1.

IV

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

A. Cause A-812 United States Supreme Court, time extension ordered to and including May 28, 1986, by Justice Stevens. See appendix.

B. February 27, 1986, is the date of the "Refusal to Hear" of the Supreme Court of Indiana.

C. There was no "Rehearing" after the "Refusal to Hear". A "Rehearing" is

not permitted by Indiana Rule 11-B-8.

D. There is no other Court to which this cause can be appealed beyond the Indiana Supreme Court; therefore, this Court is the Court of Last Resort and does in fact have jurisdiction. See "Rules of the Supreme Court of the United States" Rule 17-1-(b). Appellate Rule 11-B-8.

V

CONSTITUTIONAL PROVISIONS - AMENDMENTS, STATUTES, ORDINANCES AND REGULATIONS WHICH THIS CASE INVOLVES.

Amendment - I:

> "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press;"

Amendment - IV:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describ-

ing the place to be searched, and the person or things to be seized."

Amendment V:

"...Nor shall any persons be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without Due Process of Law:"

Amendment VI:

"This constitution, and the laws of the United States which shall be made in pursuance thereof; ...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Amendment IX:

"The enumeration of the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without Due Process of Law; nor deny to any person within its jurisdiction the

equal protection of the laws."

VI

CONCISE STATEMENT OF THE CASE

Sybil Bennett had a problem breathing most of her married life. She went to a Doctor Van Ness who apparently did not find the cause of her problem. Since she was 47 years of age, he gave her a hormone injection which aggravated her problem. This was June 2, 1983. On her way home, she feared having an auto accident so she stopped at the appellants' place of business.

Ellen Graham was a Registered Nurse, licensed in the State of Indiana, and had been director of a school of nursing for several years. Harry Graham had been a Medical Doctor's chief assistant in the Army for four (4) years.

Petitioners Harry Graham and Ellen Graham are members of the same local Seventh-Day Adventist Church where deceased Sybil Bennett was a member. They were all adults of

sound mind and had the same religious convictions regarding maintaining and regaining health through natural methods as opposed to using poisonous drugs. These petitioners consented to Sybil's request to come into their house until she felt better. They helped her with a 'Home Nursing' type of program for six (6) weeks, at which time Sybil showed Ellen a Large ulcer on her breast. The petitioners assisted in making an appointment with an Osteopathic Doctor Goldberg across the State line in Dayton, Ohio.

Sybil's husband, Jack Bennett, furnished the car and took Sybil to the doctor. Harry went along. The ulcer was diagnosed as cancer. Dr. Goldberg filled out all federal documents necessary to prescribe and obtain laetrile legally and supplied a dietary program. Sybil was not able to get more than small quantities of of food or juice into her stomach at a

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time, so the petitioners attempted to supplement her nutrition with cup-full quantities of juices in the form of enemas. Cleansing enemas were also given. Sybil expressed her appreciation for the religious atmosphere at the petitioners' house. When Sybil Bennett first cam to the petitioners, she was employed by a dental clinic. Even so, her chewing teeth were rotted and/or worn down to the gums. Realizing the hazards of abscessed teeth, the Grahams persuaded Sybil to go to a dentist to get them cared for.

At the first trip to the dental surgeon, four (4) teeth were pulled from one side of the upper jaw. One week later, four (4) teeth were pulled from the other side of the upper jaw. Sybil's husband, Jack, was complaining about driving over 100 miles to the dental surgeon. At the third appointment - one week after the second appointment - in her weakened condition, she was

given three (3) injections of anesthetic. Three (3) teeth were pulled from one side of the lower jaw, two (2) teeth were pulled from the front; and two (2) teeth were pulled from the other side, all from the lower jaw. Abscesses do not drain well from the lower jaw. That much absorption of drainage, plus three (3) doses of Novocaine on top of the serious cancer, in her weakened condition, was more than her body could handle. Sybil worsened rapidly. She was taken to a local hospital August 24, 1983. She died in the hospital September 11, 1983, without the Grahams seeing her in the intervening period. There was no autopsy performed. September 30, 1983, the petitioners' property was searched. Some areas were searched that were not on the search warrant. Over $10,000.00 worth of items and money were confiscated.

October 17, 1983, the petitioners were arrested and held in the Delaware County

jail on $50,000.00 bond each. They were released on a property bond October 31, 1983. The petitioners were charged, tried, and convicted on three (3) counts:

Count I - Involuntary Manslaughter

Count II - Reckless Homicide

Count III - Unlawful Practice of Medicine.

The petitioners, Harry Graham and Ellen Graham, were each sentenced to three (3) years plus $5,000.00 on Count II plus three (3) years on Count III to run concurrently. Count I was dropped. This cause was appealed to the Indiana Court of Appeals No. 1 and lost August 10, 1985. The request to the Indiana Supreme Court to hear this cause was refused February 27, 1986. The petitioners owe their attorney $27,750.00. He has withdrawn as their attorney. Petitioners are now appealing pro se to this Court in quest of justice.

The grounds upon which the jurisdiction of this Court are sought in this cause are:

(a) Date and Time of Order extending time to file. On April 23, 1986, there was an order issued by Honorable John Paul Stevens granting an extension of time to this cause No. A-812 for filing a "Petition for Writ of Certiorari" to and including May 28, 1986.

(b) The date of the decision of the Supreme Court of the State of Indiana when it refused to hear the transfer of this cause, when it was recorded, is February 27, 1986. See appended order.

(c) There was no rehearing after the 'Refusal to Hear.' Appellate Rule 11-B-(8) 'No petition for rehearing will be permitted to be filed upon denial of a petition to transfer.'

(d) STATUTORY PROVISIONS - This Court is the Court of Last Resort. There is no other Court where petitioners can go to from the Supreme Court of the State of Indiana. vs 28 ss 1257.1 (3)

ISSUES RAISED:

1. The Constitutionality of the Indiana Medical Licensing Law: I.C. 25-22.5-1-1.1 (a). See appendix. The definition of the practice of medicine was raised at the following times and other times.

(a) "Brief for transfer" pages 1, 4-6

(b) "Brief for rehearing" pages 1, 3

(c) "Petition for rehearing" pages 4(a)

(d) Appellate Court's "Decision Document" pages 4, 10

(e) "Appellant brief" page 13

(f) Correction of errors - memorandum, page 5

(g) R. 591-604, 304-308, 373, 374. The law was upheld in all three counts.

2. That the search warrant was unconstitutional. See appendix.

(a) "Brief of transfer" pages 1,2

(b) Court of Appeals "Decision Document" pages 4, 5, 6

(c) "Brief for rehearing" pages 1, 2

(d) "Petition for rehearing" page 4-(b)

(e) "Appeals brief" pages 8, 9, 11, 12

(f) "Motion to correct errors", memorandum, pages 1, 2, 4, 5-7

(g) R. 257-262, 300

The Search Warrant was upheld in all three courts.

3. That the Court of Appeals' Opinion contravenes ruling precedent of the Indiana Supreme Court. See appendix.

(a) Appellants' petition for transfer pages 1, 2, 8-9

(b) Brief in support of rehearing pages 1-2, 8-9

(c) Court of Appeals "Decision Document" pages 17-20

(d) Appeal Brief of appellants pages 44-50

(e) Defendants' objections to jury instructions pages 1-4

Objections were overruled.

4. Prejudicial evidence should not have been admitted in court. See appendix.

(a) "Brief of transfer" pages 3, 4, 10

(b) "Rehearing brief" pages 2, 8

(c) "Petition for rehearing" page 4. (c) (d)

(d) Court of Appeals "Decision Document" 5, 19

(e) "Appellants' brief" pages 1, 44-50

(f) "Correction of errors" pages 5-11 "Correction of errors" memorandum pages 8, 9

(g) R. 260-263, 300, 301

The use of this prejudicial evidence was permitted by Honorable Robert Barnett, Justice of the Delaware County Superior Court No. 1, and was upheld by the Indiana Court of Appeals No. 1 and the Indiana Supreme Court.

5. Wrong definitions of "Reckless Homicide". See appendix.

(a) "Transfer brief" pages 2, 10

(b) "Rehearing motion" pages 4, 9

(c) "Petition for rehearing" page 4 (e)

(d) Court of Appeals "Decision Document" page 4, 10

(e) "Appeals brief" pages 12, 29

(f) "Correction of errors" page 1; memorandum, pages 1, 12-13

(g) "Brief Narrative of Evidence" page 4

(h) R. 57, 175, 177, 178, 179, 215, 304, 309, 310, 313, 314, 315, 426

The new definition of reckless homicide and involuntary manslaughter by Honorable Robert Barnett, Justice of the Delaware County Superior Court No. 1 was upheld by the Indiana Court of Appeals No. 1 and the Indiana Supreme Court.

5. Refusal of Nursing License Defense. See appendix.

(a) "Transfer brief" pages 2, 11, 12

(b) "Rehearing brief" pages 2, 10

(c) "Petition for rehearing" page 4 (f)

(d) Court of Appeals "Decision Docu-

ment" pages 4, 10

(e) "Appeals brief" pages 1, 13, 33

(f) "Correction of errors" pages 4, 11

"Correction of errors" memorandum pages 7-8

(g) "Original Court" (R) 307, 333, 346 347, 350, 373, 393, 510, 591, 342, 604, 158, 179, 185, 186, 306

(h) "Brief Narrative of Evidence" pages 1, 5, 6

The Nursing License defense was denied by the trial court and the denial was upheld by the Court of Appeals and the Indiana Supreme Court.

7. Religious Rights Violated. See appendix.

(a) Court of Appeals "Decision Document" page 2

(b) "Appeals brief" page 4

(c) "Motion to Correct Errors"

Page 12 "Motion to Correct Errors" memorandum, page 7, 8

(d) "Brief Narrative of Evidence" pages 1, 5

(e) (R) 40, 41, 122, 132, 133, 135, 399, 553, 554, 562, 563, 568, 569.

The Religious defense was rejected by the trial court and by the Appeals Court and by the Indiana Supreme Court.

8. Basic Constitutional, pre-Constitutional and Common Law rights were violated. See appendix copy of the "Declaration of Independence", "Amendments to the Constitution of the United States" and Article I of the Constitution of Indiana.

(a) "Life, Liberty and the pursuit of Happiness;" see Declaration of Independence; also, State of Indiana Constitution, Article No. 1.

(b) Other rights. Petitioners were not protected by these. R. 54, 55, 60-64-70, 118, 119, 153, 166, 169-176, 180, 185, 187, 188, 206, 306, 307, 309.

9. Double jeopardy should reverse the

conviction of the petitioners. Both petitioners were charged, tried, and convicted of "Involuntary Manslaughter", "Reckless Homicide", and "Unlawful Practice of Medicine", all for the same acts on the same person. See appendix - Jury Instructions Nos. 4-9.

10. No autopsy was performed to verify evidence of true cause of death. The Delaware County Coroner participated in the search of the petitioners' premises, but there was no autopsy performed. See appendix. (R.-187). 185, 186, 199

JUDGMENTS SOUGHT TO BE REVIEWED:

Petitioners respectfully request this Most Honorable Court to review the following decisions.

1. Refusal of the Indiana Supreme Court to hear petitioners' appeals. See appendix - "Refusal to Hear".

2. Appeal from the Delaware Superior Court No. 1 to the Appeals Court No.1 of

Indiana. See appendix - "Decision Document" page 22. "The trial court is in all things confirmed."

3. All points wherein the Delaware County Superior Court No. 1 convicted the petitioners.

VII

ARGUMENT

Issue No. 1

That the opinion of the Court of Appeals erroneously decides a new question of law. And that it was upheld by the Indiana Supreme Court by its denial to review. The Indiana Code Section 25-22.5-1.1 (a) (Burns 1982) defines the practice of medicine as:

> (a) "Holding oneself out to the public as being engaged in the diagnosis, treatment, correction or prevention of any disease, ailment, defect, injury, infirmity, deformity, pain or other condition of human beings, or the suggestion, recommendation or prescription or administration of any form of treatment, without limitation, or the performing of any kind of surgical operation upon a human being, including tattooing, or the penetration of the skin or body orifice by any means, for the intended palliation, relief, cure or

prevention of any physical, mental or functional ailment or defect of any person;

(2) The maintenance of an office or place of business for the reception, examination or treatment of persons suffering from disease, ailment, defect, injury, infirmity, deformity, pain or other conditions of body or mind; or

(3) Attaching the designation 'doctor of medicine', 'M.D.', 'doctor of osteopathy', 'D.O.', osteopathic medical physician', 'physician', 'surgeon', or 'physician and surgeon', either alone or in connection with other words, or any other words or abbreviations to his name, indicating or inducing others to believe that the person is engaged in the practice of medicine or osteopathic medicine as herein defined."

As this statute has never before been constitutionally challenged, the Court of Appeals and the Indiana Supreme Court erroneously decided a new question of law when they upheld this code provision. Petitioners contend that this statute is unconstitutional in that it is so vague that men of common intelligence must necessarily guess at its meaning, and therefore, it

violates due process of law. See, Grody v. State, (1972) 257 Ind. 641, 178 N.E. 2d 280. This statute does not permit a person to differentiate between lawful and unlawful conduct, and is subject to discriminatory enforcement, thereby falling within the prohibitions of Grayned v. City of Rockford. (1972) 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222. In order to comply with due process requirements under the Fourteenth Amendment, a statute must give sufficient prior notice to those who must conform their conduct to the dictates of the law, and furthermore, must be so definite as to provide workable standards for enforcement and adjudication. Nova Records, Inc. v. Sendak, (1980) 504 F.Supp. 938, Aff'd 706 F. 2d 792. It is possible to visualize many examples of conduct which could literally be a violation of this statute, but which are logically absurd. A masseuse or masseur, for example, would

have to obtain a license to practice medicine, as well as a health food store proprietor who recommended herbs or health regimens to the public. The code provision in question is so vague that these possibilities are illogical examples of conduct that could actually be prohibited. A statute which is so vague as to reach such a variety of conduct is unconstitutional in that it does not afford notice to a person as to what conduct is prohibited, in violation of due process. INDIANA MEDICAL LICENSING LAW I.C. 25-22.5-1-.1 Was not the unconstitutionality of this law demonstrated in the Court at trial when a nurse from the Indiana Nursing Board testified in Court that she, as a registered nurse, did not dare to pick a sliver out of someone's finger without a medical doctor's order (R.603)? Also, that she, as a registered nurse, did not dare to use a tongue depressor and look at a person's throat without an order from a medical doc-

tor (R. 603). The Graham's attorney pointed out to Judge Robert Barnett that putting a baby bottle in a hungry baby's mouth would be penetrating a body orifice. Upon investigation, it would also be preventing "Mal-Nutrition", another violation. Recommending an aspirin would be a violation as would suggesting to a person that smoking cigarettes might cause lung cancer. Does this violate freedom of Speech and of the Press as related in the first Amendment to the Constitution? High levels of potassium were referred to by the prosecutor and the Appeals Court, however, investigation of Sybil Bennett's hospital records show that the potassium level was within the normal limit, albeit at the upper limit when she entered the hospital. See appendix. (Sybil's records). Five would hardly be considered a toxic level as stated in the "Decision Document" of the Appeals Court (p. 4) and upheld by the INDIANA SU-

PREME COURT. Two days after admission, more potassium was given to her. The well-defined principles researched from the high court determined:

> "..The DECISIONS which ..an individual may make without unjustified government interference..MUST MEET TWO CRITERIA. First, they must be 'PERSONAL DECISIONS'. Id. They must primarily involve one's self or one's family. SECOND, they must be 'IMPORTANT DECISIONS' .. They must profoundly affect one's development or one's LIFE..... DECISIONS relating to MEDICAL TREATMENT ... ARE, to an extraordinary degree intrinsically personal. It is the individual making the decision, and no one else, who LIVES WITH THE PAIN AND DISEASE. It is the individual making the decision, and no one else, who IF HE OR SHE SURVIVES, MUST LIVE WITH THE RESULTS OF THAT DECISION. One's HEALTH is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature. Second, it is impossible to discuss the decision to obtain or REJECT MEDICAL TREATMENT without realizing its importance. The decision can either produce or eliminate PHYSICAL, PSYCHOLOGICAL and EMOTIONAL RUIN. It can destroy one's economic stability. It is, for some, the DIFFERENCE BETWEEN a life of pain and a life of pleasure. It is, for others, the difference between LIFE and DEATH....Thus, the decision to OBTAIN or REJECT MEDICAL TREATMENT.... is both personal and important enough to be encompassed by the right of pri-

> vacy. This should come as no surprise. To begin with, the Fifth Circuit held over twenty-one years ago that 'the State cannot deny to any individual the right to exercise a REASONABLE CHOICE in the METHOD OF TREATMENT OF ILLS.'" England v. Louisiana State Board of Medical Examiners, 259 F. 2d 626, 627.

This is the primary issue of the whole cause. Sybil Bennett chose an alternative method which certainly appears to be her right. The petitioners have been thrown in jail twice for a total of 5 weeks and have spent over 2 months in the Indiana State penal system for supplying Sybil Bennett with what petitioners believe she had a right to have.

IS THIS "DUE PROCESS"?

> I.C. 25-22.5-8-4. Injunctions. The attorney general, prosecuting attorney, the board or any citizen of any county where any person engages in the practice of medicine or osteopathic medicine without a license or a permit to do so, may, according to to the laws of Indiana government injunctions, maintain an action in the name of the state of Indiana to enjoin the person from engaging in the practice of medicine or osteopathic medicine. In charging any person in

an affidavit, information or indictment, with a violation of this law by practicing medicine or osteopathic medicine without a license or permit, it is sufficient to charge that he did, upon a certain day and in a certain county, engage in the unlawful practice of medicine or osteopathic medicine and that he did not have any license or permit to do so. No further or more particular fact need be averred concerning the matter.

Issue No. 2

That the decision of the Court of Appeals and the Indiana Supreme Court in its refusal to hear Contravenes ruling precedent of the Indiana Supreme Court and the United States Supreme Court.

The Indiana Code Section 35-33-5-2 provides as follows:

"Sec. 2 (a) Except as provided in subsection (c), no warrant for search or arrest shall be issued until there is filed with the judge an affidavit, particularly describing the house or place to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes that such things as are to be searched for are there concealed, or that the person to be arrested committed the offense, and setting forth facts then in knowledge of the affiant

> or information based on hearsay, constituting the probable cause. When based on hearsay, the affidavit must either:
>
> (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
>
> (2) contain information that establishes that the totality of the circumstances corroborates the hearsay."

In the case at hand, there was no attempt made to establish the credibility, reliability or veracity of the informants, nor was there any attempt made to show that the totality of the circumstances corroborated the hearsay testimony given by Officer Richard McCord. No exhibits were introduced at the hearing on the Motion to Suppress and no documentation whatsoever. This differs from Illinois v. Gates, (1983) _____U.S. _____, 103 S. Ct. 2317, 76 L. Ed. 2d 527, which first established the "totality of the circumstances" test. In that case, upon receipt of an anonymous

letter, an independent investigation was conducted which verified at least some of the information contained in the letter. There was no evidence of even partial verification in the case at bar that would support the issuance of the search warrant. See, McClain v. State, (1980) Ind., 410 N.E. 2d 1297. The evidence introduced at the hearing clearly failed to meet the requirements of I.C. 35-33-5-2, and violated the requisities of both Indiana and United States Supreme Court precedent. Consequently, the Motion to Suppress and the objections made at trial to the evidence obtained under the search warrant should have been sustained.

Issue No. 3

That the Court of Appeals' opinion contravenes ruling precedent of the Indiana Supreme Court. Also that the Indiana Supreme Court reversed itself in this cause by refusing to hear.

The Court of Appeals' decision at p. 16-19 held that because Appellants' counsel used the word "variance" in describing his objection to the admission of certain irrelevant evidence, (see TR 878-879) and the definition of the word "variance" was not applicable to the objection raised, the objection was properly overruled. While the word "variance" was used by counsel, the true nature of objection was in fact made known to the Court. The evidence was not covered by the information and was irrelevant, immaterial and highly prejudicial to the Appellants. The Indiana Supreme Court has held that where the State understood the objection being made, and the grounds therefore, and that the nature of the objection was equally understood by the Court, then "when these purposes are fulfilled, the objection is adequate." See Candler v. State, (1970) 266 Ind. 440, 362 N.E. 2d 1233; and Hammer v. State, (1976) Ind. 354

N.E 2d 170. It was then error to construe counsel's objection (See TR 878-879) in such a hyper-technical manner. This is not the case of the general objection which fails to preserve a specific question for review, but rather counsel has stated in definite terms the substance of his objection, and it should have been considered on review based on its substance and not its technical form. See Bassemier v. Sartore, (1964) Ind. App., 201 N.E. 2d 285.

Issue No. 4

The Indiana Court of Appeals' decision and the decision of the Indiana Supreme Court by its refusal to hear contravenes precedent of the Indiana Supreme Court.

The Court of Appeals at p. 19-20 of its opinion held that testimony and photographic evidence which depicted the condition of the Hoosier Health House on September 30, 1983, more than one month after Sybil Bennett was last present at the Ap-

pellants' establishment was admissable. Appellants would argue that under the doctrine of fundamental error, if the error plainly appears on the face of the record, and is so prejudicial that it deprived the defendants of fundamental due process, then the reviewing court should address the issue. See Rowley v. State, (1982) Ind. 442 N.E 2d 343. Furthermore, the doctrine applies equally to the admission or exclusion of evidence. See Moore v. State, (1982) Ind. 440 N.E. 2d 1092. Where fundamental error exists, the procedural error will be ignored and the Court will review the merits of the case. See Newton v. State, (1984) Ind. App., 460 N.E 2d 1266; and Meredith v. State, (1982) Ind. App., 439 N.E. 2d 204. It is the Petitioners' contention that the evidence admitted was so blatantly prejudicial that the Court of Appeals should have reviewed the issue, even though technically Petitioners did

not set forth in detail in their brief the exact prejudicial effect of the evidence admitted.

Issue No. 5

That the Court of Appeals' opinion fails to give a statement in writing concerning issues raised by the parties; further, it contravenes ruling precedent of the Supreme Court of Indiana and is in conflict with other and prior Indiana Court of Appeals' decisions. The Court of Appeals opinion also erroneously decides a new question of law. This was also the decision of the Indiana Supreme Court by its refusal to hear.

The Court of Appeals held that Petitioners' objections to certain instructions were waived due to insufficient specificity. But this issue of waiver was never raised by the State in its brief and, therefore, the court completely failed to address the substantive contentions of the litigants, that is, that certain of the

instructions given do not represent the law of Indiana as to involuntary manslaughter and reckless homicide. By affirming the instructions given the jury, the Court of Appeals is approving a completely new concept of law in the State of Indiana as to the definition of the crimes of reckless homocide and involuntary manslaughter. The concept adopted by the trial court and the Court of Appeals is a radical departure from established Indiana law. Indiana law requires that for a homicide, the defendant must have inflicted or caused to be inflicted an injury upon the victim which was a direct and proximate cause of death. See Gibbs v. State, (1981) Ind. App., 426 N.E 2d 1150; Reed v. State, (1979) 180 Ind. App. 6, 387 N.E 2d 82; State v. Kelsey, (1975) 163 Ind. App. 543, 325 N.E 2d 218. There must be an injury to the decedent which contributes mediately or immediately to his death. Miller v. State, (1975) 263

Ind. 595, 335 N.E 2d 206; Wahl v. State, (1951) 229 Ind. 521, 98 N.E 2d 671; Hicks v. State, (1938) 213 Ind. 277, 11 N.E. 2d 171. The instructions on the law given in the instant case were derived from non-authoritative precedent ranging from a 1966 California case (Instruction No. 26) to a Massachusetts case decided in 1884 (Instruction No. 23). These instructions, which include Nos. 23, 24, 25, and 26, completely ignore and radically alter the general definition of these crimes under the Indiana law.

Issue No. 6

That the Court of Appeals' opinion contravenes ruling precedent of the Indiana Sureme Court and is in conflict with other decisions of the Court of Appeals but was upheld by the Indiana Supreme Court's Refusal to hear.

A party has the right to insist that the Court instruct the jury specifically

on all legal questions necessary to enable the jury to reach a true verdict in a criminal prosecution and to have the instruction made so specific as to apply to the facts of the particular case developed by the evidence. Hendrick v. State, (1951) 229 Ind. 381, 98 N.E 2d 906; Zimmerman v. State, (1984) Ind. App., 469 N.E 2d 11. In determining if an instruction has been properly refused, the Court must ask (1) whether the instruction correctly states the law, (2) whether there is evidence in the record to support the giving of the instruction, and (3) whether the substance of the tendered instruction is covered by other instructions which are given. Davis v. State, (1976) 265 Ind. 476, 478, 335 N.E. 2d 836, 838. Furthermore, a defendant is entitled to an instruction on any defense that has some foundation in the evidence, even if the evidence is weak and inconsistent.

Harrington v. State, (1980) Ind., 413

N.E. 2d 622, trans. denied. Both Petitioners in this case relied upon the nurses' licensing statute in their defense. It was not covered by the substance of any other instruction. There was, at a bare minimum, weak evidence to support the giving of the Appellants' instruction. Ellen Graham raised the argument that at least some of her conduct - if not all - was part of a nursing regimen. She also claimed the defense of gratuitous care. One of Harry Graham's defenses was that he was acting under the direction of a licensed health care professional as defined by the statute. Furthermore, evidence was introduced that the Laetrile injections were given pursuant to the authority of Dr. Goldberg, a licensed osteopath from Ohio. Did Federal law superseed Indiana State law? The Laetrile was administered under the "Bohanan Decision," which covers all states, including Indiana. (See R. 333. 350)

The exclusion in the Indiana Medical Licensing Law I.C 25-22.5-1-2 states:

> "EXCLUSIONS": This article insofar as it relates to the unlawful or unauthorized practice of medicine or osteopathic medicine shall not apply: (K) to any nurse practicing his profession under I.C 25-23. . .
>
> I.C. 25-23-1-1 defines Registered Nurse as follows:
>
> (b) The term "registered nurse" means a person who holds a valid license pursuant to the terms of this chapter, and who bears primary responsibility and accountability for nursing practice based on specialized knowledge, judgment and skill derived from the principles of biological, physical and behavioral sciences.
>
> The registered nurse practices in the profession of nursing by the performance of those activities which include but are not limited to:
>
> (1) Identifying human responses to actual or potential health conditions;
>
> (2) Deriving a nursing diagnosis which identifies the needs of the individual and/or family;
>
> (3) Executing a nursing treatment regimen through the selection, performance and management of nursing interventions based on the nursing diagnosis; . . .
>
> (4) Administering, supervising, delegating and evaluating nursing activi-

ties; . . .

Additional text in appendix.

"Decision Document", pages 15, 16.

Did not petitioner Ellen Graham, RN, have every right to perform each and every act as a Registered Nurse of which she was charged under the Unlawful Practice of Medicine Charge? Did not petitioner Harry Graham have every right to perform each and every act under the direction of Ellen Graham, R.N., of which he was charged under the Unlawful Practice of Medicine Charge?

RELIGIOUS FIRST AMENDMENT RIGHTS.

Issue No. 7

One of the major tenets of Faith of the founders of the Seventh-Day Adventist Church was 'Natural Healing' using basic, fundamental natural methods and items such as exercise, fresh air, cleanliness, using pure water inside and outside the body and a healthful diet emphasizing fresh, raw

fruits, vegetables and nuts. It also included well-cooked grains and beans. Their first institution of consequence was the world-renowned Battle Creek Sanitarium, Battle Creek, Michigan, where these methods were used.

One of the founders was Ellen G. White who, it is believed, received many visions from God concerning many religious subjects, including health. It is believed that a healthy body assists in having a healthy mind and a healthy mind assists in having a deep insight into religion, science or other philosophical subjects. It is believed that <u>religion, life and health are inseparable parts of each other</u>.

Natural methods of healing are a part of the Seventh-Day Adventist religion and are to be practiced by the faithful members. Ellen G. White instructed the members as follows:

> "There are <u>many ways</u> of PRACTICING THE HEALING ARTS, but there is <u>ONLY</u>

ONE WAY THAT HEAVEN APPROVES. God's REMEDIES ARE THE SIMPLE AGENCIES OF NATURE that will NOT tax or DEBILITATE the system through their powerful properties. Pure AIR and WATER, CLEANLINESS, a PROPER DIET, PURITY OF LIFE, and a firm TRUST IN GOD ARE REMEDIES for the want of which thousands are dying; yet THESE REMEDIES are going out of date because their SKILLFUL USE requires WORK that the people do not appreciate. Fresh AIR, EXERCISE, pure WATER, and CLEAN, sweet PREMISES are within the reach of all with but little expense; but DRUGS are expensive, both in the outlay of means and in the EFFECT PRODUCED UPON THE SYSTEM." Testimonies for the Church Vol. 5, p. 443, Ellen G. White.

The Petitioners must explain to the Court WHY some of the Leaders and Medical Doctors in his four-and-a-half million (4,500,000) member church do NOT follow Natural Methods of Healing. As in many other denominations, there are those church members who try to follow closely the doctrines and instructions, and there are those who do NOT. The inspired counsel further states:

"DISEASE is an effort of NATURE to free the system from conditions that result from a violation of the LAWS OF HEALTH. In case of SICKNESS, THE

> CAUSE SHOULD BE ASCERTAINED. UNHEALTHFUL CONDITIONS SHOULD BE CHANGED, WRONG HABITS CORRECTED. Then NATURE IS TO BE ASSISTED in her effort to EXPEL IMPURITIES and to REESTABLISH RIGHT CONDITIONS IN THE SYSTEM. Pure AIR, SUNLIGHT, ABSTEMIOUSNESS, REST, EXERCISE, PROPER DIET, the use of WATER, TRUST IN DIVINE POWER - THESE ARE THE TRUE REMEDIES. EVERY PERSON SHOULD HAVE A KNOWLEDGE OF NATURE'S REMEDIAL AGENCIES AND HOW TO APPLY THEM." Ministry of Healing p. 127, Ellen G. White.

Indiana Constitution Article 1:

Section 2. All people shall be secured in the natural right to worship Almighty God, according to the dictates of their own consciences.

Section 3. No law shall, in any case whatsoever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.

Does not the Indiana Medical Licensing Law I.C. 25-22.5 unduly restrict the petitioners' rights as protected by the constitution of the United States in the First Amendment, concerning the 'Free exercise of religion'? And the Constitution of the

State of Indiana?

There are many people in Indiana, and elsewhere, who are anxious to testify to the benefit and efficacy of these alternate Natural methods. They have been substantially and unequivocally proven to cure, heal and restore to health, those who faithfully follow them.

> "No RIGHT is held more SACRED, or is more carefully guarded, by common law, than the RIGHT of EVERY individual to POSSESSION and CONTROL of his own person, free from ALL RESTRAINT or INTERFERENCE unless by clear and unquestionable authority of law." TERRY v. STATE OF OHIO, 88 S.Ct. 1868, 393 U.S. 1 (1968).

> "If there are TWO places for TREATMENT of a TROUBLE, the individual has a RIGHT to make his choice. . . TWO schools of medicine." HOXEY v. FISHBEIN, 83 F. Supp. 282, at 284 (1949).

Petitioners Ellen Graham and Harry Graham and also deceased Sybil Bennett were all members of the same local Seventh-Day Adventist Church; they were practicing that part of their religion dealing with health as they understood it.

Petitioners Harry and Ellen Graham conscientiously plead for their "EQUAL RIGHT to "EXERCISE" their "RELIGION" and obey their Lord and Master.

Issue No. 8

Other Constitutional Rights:

(a) The courts in this cause readily accepted the right of Sybil Bennett to choose the options supplied by the medical doctors and hospitals. They also verified the right to choose no care (R) 180. The medical licensing law I.C. 25-22.5 and the courts refused to Sybil Bennett and many others the alternatives she and they desire that fall between those two extremes by putting in jeopardy those who would supply those methods and who are qualified to use them (R-169). This right to choose alternative modes of health care was established by Andrews v. Ballard (1980) 498 F. Supp. 1046-1051. When a citizen chooses a mode of health care that is not available through

the established sources of health care that he wants, then those who can and will supply that service shall not be prevented from supplying that mode of health care. (See R 306).

> "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and Pursuit of Happiness. That to secure these rights, Governments are instituted among men". Declaration of Independence.

Indiana Constitution Article 1:

> Section 1. We Declare that all people are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are Life, Liberty, and the pursuit of Happiness; that all power is inherent in the people.

Does the "Declaration of Independence" which even preceded the Constitution of the United States guarantee LIFE to its citizens? Is it true that good Health equals good LIFE: poor Health equals poor LIFE and no Health equals no LIFE? Is it true that what affects Health affects LIFE?

Therefore, is it true that each citizen has a right to the things that he believes will improve the quality and/or length of his life?

> "Certain unalienable Rights; that among these are Life, LIBERTY . . ."

Does that Liberty give a citizen the right to choose the method of health care he desires whether approved by other citizens or not? Is that his right?

Is that right denied him if the person or persons who are willing to supply that method are prevented by law from supplying the same as in the cause of Sybil Bennett and the petitioners?

Does the United States Constitution guarantee these same rights in Amendment V?

> "Nor shall be deprived of Life, Liberty or Property without due process of law?"

Was Sybil Bennett denied her right to HAPPINESS?

> The "Unalienable(Inalienable) right to Life, Liberty and the Pursuit of HAPPINESS".

Sybil Bennett was denied the "Happiness" or pleasure or comfort of spending her last days, hours and moments in a familiar, desirable and friendly atmosphere. Instead, she was FORCED to spend that time in cold, mechanical and agonizing circumstances. She requested that she be able to leave that environment and agony even though it meant shortening her life. (R) 168-176. Quality apparently meant more to her than quantity. She was deprived of that right because of I.C 25-22.5.

Did this deprive her of her constitutional rights?

Does the Indiana Constitution also guarantee these rights?

> Indiana Constitution:
>
> Section 1. "We declare that all people are created equal; that they are endowed by their Creator with <u>certain inalienable rights</u>; that among these are LIFE, LIBERTY and the Pursuit of <u>HAPPINESS</u>; that all power is inherent in the people . . ."

Does the Indiana Medical License Law I.C.

25-22.5 violate these rights?

> I.C. 25-22.5-1-1.1 (a) (1) Holding oneself out to the public as being engaged in the diagnosis, treatment, correction or prevention of any disease, ailment, pain or other condition of human beings, or the suggestion, recommendation or prescription or administration of any form of treatment, without limitation or the performing of any kind of surgical operation upon a human being, including tattooing, or the penetration of the skin or body orifice by any means, for the intended palliation, relief, cure or prevention of any physical, mental or functional ailment or defect of any person.

Does this law deprive the citizens of Indiana of their Constitutional rights to life by depriving them of some method which they sincerely believe will give them a better quality of life and/or a longer life? Would this law jeopardize one citizen for telling another citizen that smoking cigarettes might cause lung cancer and "suggesting" that he stop? Is this law really constitutional?

(b) Was Freedom of Speech also violated by this law and by the decisions of the Supe-

rior Court, the Indiana Court of Appeals and the Indiana Supreme Court? Please note the following in the above-mentioned law: I.C. 25-22-1-1.1 (a) (1)

> ". . . the suggestion, recommendation or prescription or administration of any form or treatment, without limitation. . ."

Does this violate the Freedom of Speech Clause?

(c) Was the "Right of Contract" violated (R) 407-408 (State Exhibit No. 11)? See appendix.

(d) Was the "Sherman Anti-Trust Law" violated by the gross elimination of Competition?

Issue No. 9

DOUBLE JEOPARDY

The petitioners were each charged with 3 counts - Count I, Involuntary Manslaughter; Count II, Reckless Homicide; and Count III, Unlawful Practice of Medicine - all for the same acts. The petitioners' counsel tried to get Count I or Count II dropped, but

Honorable Judge Robert Barnett refused. There was a great amount of publicity stating all 3 charges. The petitioners were charged, tried and convicted on all three counts, all highly publicized. Since Count I and Count II are nearly the same, does that not constitute "Double Jeopardy"? At sentencing, Count I was dropped. There was only one death and only one set of acts. See Jury Instructions Nos. 4-9.

> "It is NOT NECESSARY that there be TWO PROCEEDINGS before JEOPARDY CAN ATTACH TWICE." CALLEY v. CALLAWAY, 382 F. Supp. 650 (1974).

Issue No. 10

NO AUTOPSY

The Delaware County Coroner, Mr. Glenn Scroggins, was one of the officers who executed the Search Warrant and participated in the search. He was well aware of the unusual circumstances connected with her demise. Why did he fail to perform an autopsy on Sybil Bennett? Was that not a neglect of duty and a violation of the rights

of the petitioners? See appendix - (R-187).

CONCLUSION

For all of the reasons cited above, the petitioners request this Court to consider the petitioners' cause and declare:

1. The Indiana Medical Licensing Law, I.C. 25-22.5 UNconstitutional on the following grounds:

   A. That it is vague.

   B. That it violates the "Unalienable (Inalienable, Indiana Constitution) Rights" of LIFE, LIBERTY and HAPPINESS" as stated by the "Declaration of Independence" and the "Constitution of the State of Indiana".

   C. That it violates the "Freedom of Speech and of the Press" clause of the First Amendment to the Constitution of the United States.

   D. That it violates the "Free exercise of Religion" clause of the

United States Constitution.

E. That it eliminates competition and thereby violates the "Sherman Anti-Trust Act".

F. That it violates the "Right of Contract".

2. That all convictions of the petitioners be overturned on the following grounds:

A. That the Indiana Medical Licensing Law I.C. 25-22.5 is UNconstitutional; therefore, the petitioners are not guilty.

B. That the rights to LIFE, LIBERTY and HAPPINESS of the petitioners and the deceased were violated by their convictions.

C. That the religious rights of the petitioners and the deceased were violated by their convictions.

D. That the definition of "Homicide" by Honorable Robert Barnett, that "Homicide is merely the shortening of life," is erroneous. That

the petitioners are innocent of causing injury.

E. That the Nursing Exclusion in I.C. 25-22.5-1-2 (K) totally protected petitioner Ellen Graham, R.N., and partially or totally protected petitioner Harry Graham. See I.C. 25-23-1-1-(b)-(4).

> "The registered nurse practices in the profession of nursing by ...administering, supervising, delegating and evaluating nursing activities."

F. That the Search Warrant was defective and whereas areas were searched outside the bounds of the search warrant, the petitioners should be declared innocent.

G. That prejudicial material was permitted at trial and was used to cause convictions; therefore, petitioners should be declared innocent.

H. That because "Double Jeopardy"

was truly involved since petitioners were charged, tried and convicted (with great publicity) on both "Involuntary Manslaughter" and "Reckless Homicide" for the same acts to the same person. Notwithstanding the fact that the petitioners were not sentenced for both should not be lost by this tribunal in its deliberations. That for this reason, the petitioners' convictions should be overturned.

I. That there was NO autopsy performed.

J. That the use of the word "Variance" by petitioners' counsel was not sufficient grounds to uphold their conviction.

3. That effective and desired alternative methods of health care be declared constitutional and outside the

scope of licensure because of their common law statutes.

4. That a person's right to freedom of choice in health care is encompassed in the "Free exercise of Religion" clause in the First Amendment to the Constitution of the United States and Article I of the Constitution of the State of Indiana.

5. That Honorable Robert Barnett's interpretation of involuntary manslaughter and reckless homicide be declared UNconstitutional.

6. That the petitioners be declared NOT GUILTY.

Further affiant sayeth not.

Respectfully submitted,

Harry Graham

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Rural Route 1, Box 369
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Telephone: 317-358-4069

Incarceration Address
Indiana Department of
Corrections
Indiana State Farm
P. O. Box 76
Greencastle, Indiana 46135

State of Indiana, county of Putnam

I, the above signed petitioner, do attest and declare, under oath, that the above is true and correct according to the best of my knowledge and belief.

Affirmed and subscribed to before me this 27th day of May, 1986.

My commission expires 12-17-89

Daniel G. Johnson
Notary public

DANIEL G JOHNSON
NOTARY PUBLIC STATE OF INDIANA
PUTNAM CO.
MY COMMISSION EXP. DEC 17,1989
ISSUED THRU INDIANA NOTARY ASSOC.

Ellen Graham

Ellen Graham, pro se
Rural Route 1, Box 369
Alexandria, Indiana 46001
Telephone: 317-358-4069

I, the above signed petitioner, do attest and declare, under oath, that the above is true and correct to the best of my knowledge and belief.

Sworn and subscribed to before me this 27th day of May, 1986.

My commission expires MARCH 11, 1990

Thelma J. Wardlow

Notary public, THELMA J. WARDLOW

COUNTY OF RESIDENCE: HANCOCK

86-536

Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

CAUSE NO. A - 812

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

HARRY GRAHAM AND ELLEN GRAHAM

PETITIONERS

VS.

STATE OF INDIANA

RESPONDENT

APPENDIX TO

WRIT OF CERTIORARI TO THE UNITED STATES

SUPREME COURT; ON APPEAL FROM THE

SUPREME COURT OF INDIANA

APPEARING pro se

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209pp

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Appendix to Writ of Certiorari

TABLE OF CONTENTS

OPINIONS, ORDERS, FINDINGS OF FACT, JUDGEMENTS AND DECREES. Page No.

1. Denial of Petition for Transfer - 1
2. Appeals Court Denial - - - - - - - 8
3. Criminal Docket, Superior Court No. 1, Delaware County, Indiana For Harry Graham - - - - - - - - - - 55
4. Criminal Docket, Superior Court For Ellen Graham - - - - - - - - - - 82
5. Final (Jury) Instructions - - - - 110
6. Information for Counts I, II, III, for Harry Graham - - - - - - - - 173, 173-A
7. Information for Counts I, II, III, for Ellen Graham - - - - - - - - - - 182
8. Search Warrant - - - - - - - - - - - 190
9. Abstract of Judgement for Harry Graham - - - - - - - - - - 193
10. Abstract of Judgement for Ellen Graham - - - - - - - - - - 196

OTHER APPENDED MATERIALS

Page No.

10. Who Killed Sybil Bennett? - - - - - 199

11. Sybil Bennett Was of Sound Mind - 203

EXHIBITS

A. Death Certificate of Sybil Bennett - 1

B. Property Receipt from searchers with "Search Warrant" - - - - - - - - 2

C. Plot of Area Illegally Searched - - - 3

D. Chart of some of the approximately 26 different drugs and medications given to Sybil Bennett while in the hospital - - - - - - - - - - - - - - - 4

E. Pathological report of potassium level when Sybil Bennett entered the hospital - - - - - - - - - - - - - - - -5

F. Chart of where Sybil slept - - - - - 6

G. Colonic Therapist's Certificate - - 7

H. FEDERAL (Laetrile) Affidavit - - - - 8

I. Affidavit of Donna Justinen, Registered Nurse, that Sybil Bennett was of sound mind - - - - - - - - - - - - - 9

ITEMS PREVIOUSLY FILED IN THIS COURT for this CAUSE NO. A - 812 with the "Application For Extention of Time For Writ of Certiorari".

(a) Brief In Suppoet of Appellants' Petition of Transfer.

(b) Brief In Support of Appellants' Petition for Rehearing.

(c) Appellants' Petition for Rehearing.

(d) Parts of; Brief of Appellants

(e) Brief Narritive of Evidence.

(f) Parts of; Motion To Correct Errors

(g) Memoramdium to Motion To Correct Errors.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Appellants' Petition to Transfer is hereby denied this 27th day of February, 1986.

(signed) _____
RICHARD M. GIVAN
Chief Justice of Indiana

All Justices concur.

HARRY W. GRAHAM and ELLEN GRAHAM, Appellants (Defendants Below) vs. STATE OF INDIANA, Appellee (Plaintiff Below)	NO. _____ (COURT OF APPEALS, NO.2 984 A 274) APPEAL FROM THE DELAWARE SUPERIOR COURT THE HONORABLE ROBERT L. BARNET, JUDGE

PETITION TO TRANSFER

(file stamp 10/8/85)

Pursuant to the Indiana Rules of Appellate Procedure, Rule 11 (B), the Appellants respectfully petition the Court for transfer of the above-entitled appeal and in support thereof would state the following:

1. That the Indiana Court of Appeals decided the above-entitled case with a written opinion dated July 31, 1985.

2. That the written opinion of the

Indiana Court of Appeals was a decision against the appellants herein seeking a transfer on the issues raised in this petition.

3. That the appellants are defendants in this case, and are currently released under appeal bond.

4. That a petition for rehearing was timely filed with the Court of Appeals and denied on September 18, 1985.

5. That the decision of the Indiana Court of Appeals is in error in that:

(a) The opinion of the Court erroneously decides a new point of law. The Indiana statute which defines the practice of medicine has never been tested before, and therefore the Court

(page 1)

erroneously decided the question of its constitutionality in contravention of the prohibitions against vagueness set forth in Grayned v. City of Rockford, (1972)

408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, and Grody v. State, (1972) 257 Ind. 651, 278 N.E.2d 280.

(b) The opinion of the Court contravenes ruling precedent of the Indiana Supreme Court, and the United States Supreme Court. The affidavit upon which the search warrant was issued, in the instant case the oral testimony of Officer Richard McCord, was insufficient under I.C. 35-33-5-2 in that it wholly failed to establish the credibility, reliability or veracity of the informants, nor did the testimony provide corroboration based upon a "totality of the circumstances" as required by statute and Illinois v. Gates, (1983) _____U.S._____, 103 S.Ct. 2317, 76 L.Ed.2d 527, and McClain v. State,(1980) Ind. 410 N.E.2d 1297.

(c) The opinion of the Court at p. 17-19 contravenes ruling precedent of the Indiana Supreme Court. The Court held

that because appellants' counsel inadvertently used the word "variance" to describe an objection which was in substance made known to the Court and the State as an objection to the irrelevant and prejudicial nature of the evidence admitted, it would construe the objection technically as a "variance" in contravention of Candler v. State, (1970) 266 Ind. 440, 363 N.E.2d 1233.

(d) The opinion of the Court contravenes ruling precedent of the Supreme Court of Indiana. The Court held, atp.19-20 of its opinion, that because the appellants did not show prejudice by the admission of certain photographs and testimony as to the condition of the Hoosier Health House, their objection could not

(page 2)

stand. However, appellants contend that under the doctrine of plain error, which is applicable to the admission or exclusion of evidence, the evidence admitted was

so blatantly prejudicial on its face, as to require the Court to overrule its admission in accordance with the requirements of Rowley v. State, (1982) Ind., 442 N.E.2d 343, and Moore v. State, (1982) Ind., 440 N.E.2d 1092.

(e) The opinion of the Court contravenes ruling precedent of the Supreme Court of Indiana and is in conflict with other and prior Indiana Court of Appeals decisions. The court in this case held, sua sponte, that appellants' objections to certain instructions as to the law of reckless homicide and manslaughter were waived because they were insufficiently specific. However, as the State did not raise this abjection, the Court wholly fails to address the substantive arguments made by the parties. The instructions given (nos. 23, 24, 25, and 26) completely misstate the definition of these crimes under Indiana law as found in Gibbs v.

State, (1981) Ind. App. 426 N.E.2d 1150; Reed v. State, (1979) 180 Ind. App. 5, 387 N.E.2d 82; State v. Kelsey, (1975) 163 Ind. App. 543, 325 N.E.2d 218. The instructions as given radically alter the law of Indiana by adopting definitions taken from decisions such as a 1966 California case and a 1884 Massachusetts case. The Court has thus erroneously adopted new law in Indiana based upon obscure, non-authoritative precedent which is a grave departure from well-established Indiana law.

(f) The opinion of the Court is in conflict with other Court of Appeals decisions. The Court refused to reverse the trial court's denial of an instruction as to the nurses' licensing statute which went to defenses raised by the appellants. The

(page 3)

failure to allow this instruction based upon evidence offered and in the record,

was in contravention of Harrington v. State, (1980) Ind. App., 413 N.E.2d 622, trans. denied.

6. Appellants request oral argument be set for these issues.

WHEREFORE, for the foregoing reasons and those expressed in Appellants' accompanying brief, the appellants would respectfully request the Court to grant transfer to reverse the Court of Appeals decision.

Respectfully submitted,

(signed)
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IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

HARRY GRAHAM
and ELLEN GRAHAM
Defendants-Appellants,
vs.
STATE OF INDIANA,
Plaintiff-Appellee.

No.2-984 A 274 1/

APPEAL FROM THE DELAWARE SUPERIOR COURT
The Honorable Robert L.Barnet, Judge
(Cause No. SC83/43)

RATLIFF, P. J.

STATEMENT OF THE CASE

STATEMENT OF THE CASE

Harry W. Graham and Ellen Graham were each charged with involuntary manslaughter, 2/ reckless homicide, 3/ and unlawful practice of medicine. 4/ Guilty verdicts were returned on all counts. The Delaware Superior Court subsequently entered

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1/ This case was diverted to the First District by order of the Chief Judge.

2/ Indiana Code section 35-42-1-4.

3/ Indiana Code section 35-42-1-5.

4/ Indiana Code section 25-22.5-8-1.

(end of page 1)

convictions on the reckless homicide and unlawful practice of medicine counts and sentenced each defendant to two concurrent three year terms and fines of $5000.00. We affirm.

FACTS

In February or March of 1983, Sybil Bennett developed a lump on one of her breasts. She apparently consulted briefly

with a physician concerning the growth. Fearing, however, that she would be forced to undergo a mastectomy, she sought the aid of two members of her church, Harry and Ellen Graham, neither of whom were physicians.

The Grahams are, as was Sybil, devout Seventh Day Adventists. As such, they follow the teachings of Ellen G. White, a prophet of the Seventh Day Adventist Church. Sister White advocated the use of herbs and other natural substances to assist God in healing the infirm. She also exhorted the internal and external application of pure water. Although the church itself does not encourage its members to reject medical care, Ellen White's writings discredit the use of modern drugs.

In furtherance of these theories, the Grahams established the "Hoosier Health House" in Delaware County, Indiana. This business catered primarily to those seeking

a naturopathic form of health care. The Grahams also sold minerals, vitamins, health food and equipment for processing health food. Additionally, Hoosier Health House offered numerous publications which advocated "natural" cures to various diseases including cancer.

On June 2, 1983, Sybil went to the Hoosier Health House complaining of pain behind her eyes, a chronic cough, and physical weakness. After a preliminary examination, which included urine and saliva tests, Harry devised a program to treat Sybil's ailments. This program included nutritional supplements, pulmentations,[5] enemas, and colonic irrigations.[6] On some days, the

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5/ A pulmentation is hot or cold compress applied to the skin to stimulate circulation.

6/ A colonic irrigation is similar to an enema. The procedure involves the introduction of pressurized water into the colon.

(end of page 2)

Grahams gave Sybil as many as eleven enemas employing coffee, carrot juice, aloe vera, castor oil, or pure water. In spite of these treatments Sybil's health did not improve.

Sometime later, Sybil, who was spending the majority of her time at the Hoosier Health House, showed the Grahams the lesion which had developed on her breast. Ellen, a registered nurse, immediately recognized that Sybil was potentially suffering from breast cancer. At Sybil's request, Harry set up an appointment to see Dr. David D. Goldberg in Dayton, Ohio.[7] After conducting a biopsy, Dr. Goldberg concluded that Sybil was in fact suffering from breast cancer. He prescribed the drug Laetrile for Sybil and instructed Ellen to administer the injections. The Grahams also continued to give Sybil nutritional supplements, enemas, and colonic irrigations.

During Sybil's stay at the Hoosier

Health House, her husband Jack often urged her to seek traditional medical care. Sybil, however, refused to entertain this prospect despite her deteriorating condition. On several occasions, when Jack made his pleas for Sybil to accept conventional treatment, Ellen told Sybil that "they would just cut you up." Record at 375.

Despite the Graham's multifarious efforts, Sybil's physical condition continued to decline. Finally, on August 24, 1983, Jack Bennett and a family friend, Gail Heiland, took Sybil to see Dr.Robert Suer. Sybil was so weak by this time that Dr. Suer had to examine her in the backseat of the Bennett's automobile. He found that Sybil was having respiratory distress and was slipping in and out of consciousness. Dr. Suer had Jack rush Sybil to Ball Memorial Hospital.

When she arrived at the hospital, Sybil was immediately placed on a

respirator. Initially, she was treated for heart

7/ Dr. Goldberg is an osteopathic physician licensed in Ohio. He is not, however, licensed in Indiana.

(end of page 3)

failure,8/ lung cancer, sepsis and the breast cancer which by this time had metastacized to the lung. Sybil also suffered from a lack of oxygen in her blood, pulmonary edema, and an electrolyte imbalance. It was clear to her attending physicians that Sybil's only chance for survival was chemotherapy. However, because of Sybil's critically weakened physical condition, her doctors determined that she could not survive the administration of these potent drugs. Therefore, they were forced to let the cancer run its course.

On September 11, 1982, Sybil Bennett died. The immediate cause of death was respiratory failure. This was, of course,

occasioned by the untreated breast cancer and promoted by her weak state of health. Subsequently, the Grahams were charged in connection with Sybil's death.

ISSUES

On appeal, the Grahams raise eight issues for our consideration. Rephrased and reordered, those issues are:

1. Whether the search warrant authorizing the search of the Hoosier Health House and the Grahams' residence was valid.

2. Whether the trial court erred when it refused to sever the charges.

3. Whether the definition of the practice of medicine contained in Indiana Code section 25-22.5-1-1.1(a) (Burns 1982) is unconstitutionally vague.

4. Whether the trial court correctly instructed the jury on reckless homicide and involuntary manslaughter.

5. Whether the trial court erred in refusing to give several of the Grahams'

tendered instructions.

8/ Dr. Suer felt that the heart failure may have resulted from the toxic levels of potassium contained in Sybil's system. As part of the nutritional program they designed for Sybil, the Grahams administered potassium.

(end of page 4)

6. Whether the trial court admitted evidence at variance from the charges.

7. Whether the trial court committed reversible error when it admitted certain evidence which the Grahams now contend was irrelevant and unduly prejudicial.

8. Whether the Grahams' convictions are supported by sufficient evidence.

DISCUSSION AND DECISION

Issue One

During the course of the investigation into Sybil Bennett's death, a search warrant was issued authorizing a search of the Grahams' home and the Hoosier Health House. That warrant was based, to a certain degree, on the hearsay statements of Jack Bennett

and Gail Heiland.[9] The defendants now assert that there was no testimony establishing either the hearsay declarants' credibility or a factual basis for the information they provided. Consequently, the Grahams opine that the trial court erred in overruling their motion to suppress and in subsequently admitting into evidence items seized pursuant to the search warrant.

The issuance of search warrants in Indiana is controlled largely by statute. At the time of the probable cause hearing at issue here, Indiana Code section 35-33-5-2(a) provided, in relevant part, that "[w]hen based on hearsay, the affidavit shall contain reliable information establishing the credibility of source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished." Such information is also required when a judicial hearing is used in lieu of an affidavit.

Indiana Code section 35-33-5-2(c).

Contrary to the Grahams' arguments, the requirements of the statute were met here. The facts introduced at the probable cause hearing established the credibility of Jack Bennett and

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9/ The search warrant was issued following a hearing held pursuant to Indiana Code section 35-33-5-2 (1982). An Indiana State Police Officer, First Sergeant Richard McCord, was the sole witness at that hearing.

(end of page 5)

Gail Heiland. They were not paid informants. Rather, they were cooperative citizens aiding an ongoing criminal investigation of conduct they had witnessed. Pawloski v. State (1978), 269 Ind. 350, 354, 380 N.E.2d 1230, 1232 (examining the significance of this distinction). The credibility of these informants was, under the circumstances, sufficiently established. See Baker v. State (1983), Ind., 449 N.E.2d 1085, 1091; Wells v. State (1979), Ind. App., 397 N.E.2d 1250, 1257, trans.denied;

1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, par. 3.4(a) (1978) [hereinafter cited as 1 W. LaFave]. Evidence presented at the hearing also established that there was a factual basis for the information provided by Jack and Gail. They had been at the Hoosier Health House and witnessed some of the conduct which was being investigated. This was sufficient to establish that the hearsay informants, Jack and Gail, were speaking from first-hand knowledge. That is all that is required. 1 W. LaFave, supra, at par. 3.4(b). Consequently, the search warrant was valid and the trial court did not err in admitting evidence discovered during the execution of that warrant.

Issue Two

The Grahams next maintain that the trial court erred when it denied their motion to sever the charges. In making such a determination, the trial court is

guided by statute. Indiana Code section 35-34-1-11(a) (Burns Supp. 1984) states:

> "(a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (end of page 6)
>
> (1) the number of offenses charged;
> (2) the complexity of the evidence to be offered; and
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense."

Consequently, when two or more charges are joined for trial solely on the ground that they are of the same or similar character, the defendant may demand severance. In all other cases, however, the severance

determination is firmly committed to the trial court's discretion. Eubank v. State (1983), Ind., 456 N.E.2d 1012, 1017; Willard v. State (1980), 272 Ind. 589,596, 400 N.E.2d 151, 156. These latter cases require the trial court to determine whether, considering the statutory factors, severance will "promote a fair determination of the defendant's guilt or innocence." We will reverse only when clear error in making that determination is established. Eubank, at 1017. In the present case, the charges filed against the Grahams were not joined simply because they were of the same or similar character. Therefore, we will reverse only if the Grahams demonstrate that the trial court clearly erred when it denied their motion to sever.

Here, as in Smith v. State (1984), Ind., 465 N.E.2d 1105, 1120-21,it was appropriate to join all charges for a single trial. The Grahams were each

charged with involuntary manslaughter, reckless homicide, and unlawful practice of medicine. All of these charges resulted from a single course of conduct, the Grahams' treatment of Sybil Bennett. Thus, the evidence presented at trial to support one charge was relevant to the other charges as well. In these circumstances, it cannot be said that the evidence or legal principles were so complex and confusing that the jury would be incapable of fairly determining the defendants' guilt or innocence on each charge. See e.g., Smith, at 1121; Douglas v. State (1984), Ind., 464 N.E.2d 318, 320; Eubank, at 1017; Willard,

(end of page 7)

at 596, 400 N.E.2d at 156.

This case is unlike Duncan v. State (1980), 274 Ind. 144, 409 N.E.2d 579. In that case, the defendant was charged with conspiracy to commit a felony and possession of burgler tools by a convicted felon. An

element of the possession charge was proof of a prior felony conviction. The prior felony conviction upon which this charge was based was burglary. Consequently, admission of that prior conviction would have been clearly improper in the trial of the conspiracy charge. Our supreme court concluded, therefore, that the defendant's motion to sever the two charges should have been granted. Id., at 600. The case at bar presents a far different situation. As we noted above, all of these charges related to a single course of conduct. Thus, contrary to the Grahams' arguments on appeal, all of the evidence presented during the instant trial would have been admissible in separate trials of each charge. The denial of the Grahams' motion to sever was not, therefore, reversible error.

Issue Three

As we have already indicated, the Grahams were each charged with the unlawful

practice of medicine.[10] Indiana Code section 25-22.5-1-1.1(a)(Burns 1982) defines the practice of medicine as:

> "(1) Holding oneself out to the public as being engaged in the diagnosis, treatment, correction or prevention of any disease, ailment, defect, injury, infirmity, deformity, pain or other condition of human beings, or the suggestion, recommendation or prescription or administration of any form of treatment, without limitation, or the performing of any kind of surgical operation upon a human being, including tattooing, or the penetration of the skin or body orifice by any means, for the intended palliation, relief, cure or prevention of any physical, mental, or functional ailment or defect of any person;
>
> (2) The maintenance of an office or place of business for the reception, examination or treatment of persons suffering from disease, ailment, defect, injury, infirmity, deformity, pain or other conditions of body or mind; or
>
> (3) Attaching the designation 'doctor of medicine,' 'M.D.,' 'doctor of osteopathy,' 'D.O.,' 'osteopathic medical physician,' 'physician,'

10/ Indiana Code section 25-22.5-8-1 (Burns 1982) provides:

> "Unlawful practice.--It is unlawful for any person to practice medicine or osteopathic medicine in this state without holding a license or permit to do so, as provided in this article."

(end of page 8)

> 'surgeon,' or 'physician and surgeon,' either alone or in connection with other words, or any other words or abbreviations to his name, indicating or inducing others to believe that the person is engaged in the practice of medicine or osteopathic medicine as herein defined."

The Grahams opine that this statutory definition is unconstitutionally vague. Consequently they assert, the trial court should have dismissed the unlawful practice of medicine counts. We disagree.

Due process requires that statutory prohibitions be clearly defined. Grayned v. City of Rockford (1972), 408 U.S. 104, 108, 92 S.Ct. 2294,2298, 33 L.Ed.2d 222,227. Enactments need not be drawn with mathematical certainty. However, a statute "forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." Grody v. State(1972),257,Ind.651,653, 278 N.E.2d 280,281 quoting Baggett v.Bullitt (1964), 377 U.S.360,84 S.Ct.1316,12 L.Ed2d 377.

See also Wilson v. State (1984), Ind.,468 N.E.2d 1375,1377; Wallman v.State (1981), Ind. App., 419 N.E.2d 1346, 1349. The reasons for this constitutional requirement are self evident. Vague laws do not afford the innocent fair warning of what conduct is subject to penal sanctions. They also invite arbitrary enforcement. Finally, when a vague statute abuts one of the rights enumerated in the First Amendment it inhibits the exercise of that fundamental freedom. Grayned, 408 U.S. at 108-9, 92 S.Ct.at 2299, 33 L.Ed2d at 227-8. These concerns are not implicated by the statute at issue here however. The practice of medicine definition explicitly delineates what conduct is proscribed. Therefore, it does not offend due process.

In their briefs to this court, the Grahams set out a number of examples of conduct which they contend could constitute the practice of medicine. They conclude,

presumably, that because

(end of page 9)

such conduct should not be subject to criminal liability that the statute is vague. As the State correctly points out, however, that is not the test we must employ. Rather, we must determine whether the statute adequately informs people of ordinary intelligence what conduct is proscribed. McNeely v. State (1979), 181 Ind. App.238,240, 391 N.E.2d 838,840, trans. denied. We have already determined that it fulfills that requirement. See State v. Horn (1966), 4 Ariz. App. 541, 422 P.2d 172 (holding similarly worded statute not unconstitutionally vague). Consequently, the trial court committed no error when it overruled the Grahams' motion to dismiss.

Issue Four

The Grahams also contend that the trial court erred when it instructed the jury on involuntary manslaughter and reckless homicide. Specifically, the Grahams have

challenged five of the trial court's final instructions on various grounds.[11] They have, however, waived appellate consideration of all but one of these arguments.

Initially, we note that the Grahams' objections at trial to Final Instruction 24, 25, and 26 were that: (1) they were not the law of Indiana, (2) there was no evidence to support the giving of Final Instructions 25 and 26, and (3) Final Instructions 24 and 26 were at variance from the charges. Such bare objections are wholly inadequate to preserve any error occasioned by the

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11/ The final instructions challenged here were numbered 21, 23, 24, 25, 26. In Final Instruction 21, the trial court set out the causation requirement for both reckless homicide and involuntary manslaughter. Final Instruction 23 informed the jury that consent was not a defense to a homicide prosecution. Also, Final Instruction 24 essentially stated that a person who seeks to cure those who are, because of their illness, susceptible to such claims, cannot escape the consequences of his gross ignorance of accepted medical procedures. Final Instruction 25 set out four situations in which the law imposes a duty to act. The last instruction challenged by the Grahams, Final Instruction 26, provided

that where an individual knows that another is in need of proper medical attention, but induces the other to forgo such treatment in favor of his or her own methods, and thereby shortens the life of the other, has proximately caused that person's death. This instruction also defined homicide as the shortening of human life.

(end of page 10)

giving of these instructions however. Indiana Rules of Procedure, Trial Rule 51(c); see also Whitten v. State (1975), 263 Ind. 407, 413, 333 N.E.2d 86, 91; Nationwide Mutual Insurance Co. v. Neville (1982), Ind. App., 434 N.E.2d 585, 600, trans. denied. In addition, the Grahams argued only one specific issue in their Appellants' Brief. Consequently, that is the only issue we may consider on appeal. Cox v. Ubik (1981), Ind. App.,424 N.E.2d 127, 131 n.3. In their Reply Brief, the Grahams did raise additional arguments. However, even if parties were permitted to raise new issues in their Reply Brief, we would not be able to consider those raised by the Grahams. Their Reply Brief contains only bald assertions relative

to the new issues raised. This failure to present cogent legal argument or citation to pertinent authority results in waiver of appellate consideration. See Lenard v. Adams (1981), Ind.App.425 N.E.2d 211,218; Indiana Rules of Procedure, Appellate Rule 8.3(A). Therefore, we now turn to the sole allegation of error preserved by the Grahams.

In its instructions, the trial court informed the jury of the causation requirements of both reckless homicide and involuntary manslaughter. Final Instruction 21 stated:

> "In a prosecution for Involuntary Manslaughter or Reckless Homicide, the State must prove to you beyond a reasonable doubt, that the defendants, or either of them; did an act or acts, which caused or contributed mediately or immediately to her death.
>
> In other words, before you can find the defendants, or either of them guilty of either Involuntary Manslaughter or Reckless Homicide, you must find the act or acts of the defendant or defendants was a direct and proximate cause of the death of Sybil Bennett. [Emphasis supplied] "

Record at 293. The Grahams argue that this instruction incorrectly stated the law.

They contend that in order to prove homicide, the state must show that the defendants "inflicted or caused to be inflicted an injury upon the victim which was a direct and proximate cause of death." Brief for Appellants at 32-33. The Grahams have misinterpreted Indiana law. (end of page 11)

Appellants refer us to a number of Indiana cases which do essentially state that a homicide occurs when the defendant inflicted an injury which contributed mediately or immediately to the victim's death. See Miller v.State (1975) 263 Ind.595,598, 335 N.E.2d 206,208; Wahl v.State (1951) 229 Ind. 521,533, 98 N.E.2d 671,676; Hicks v.State (1937), 213 Ind.277,295, 11 N.E.2d 171,179, cert. denied 304 U.S. 564, 58 S.Ct. 951, 82 L.Ed. 1531; Gibbs v. State (1981), Ind.App., 426 N.E.2d 1150,1154; Reed v. State (1979), 180 Ind.App. 5, 8-9, 387 N.E.2d 82,84. In these cases, however, the defendants had in fact inflicted injuries directly on their

victims. Therefore, it was appropriate for the court to discuss the causation requirement in those terms. In order to sustain its burden in homicide prosecutions of establishing causation, though, the state need only show that the defendants's conduct contributed mediately or immediately to the death of another person. Powell v. State (1982), Ind., 437 N.E.2d 969,971; State v. Kelsey (1975), 163 Ind.App. 543, 545, 325 N.E.2d 218, 219; Coffelt v.State (1974), 159 Ind. App. 485, 490, 307 N.E.2d 497, 500, quoting Votre v.State (1923), 192 Ind. 684.686, 138 N.E. 257,257; W.LaFave & A. Scott, Criminal Law § 35 (1972); C. Torcia, Wharton's Criminal Law § 26 (14th ed. 1978); 40; Am.Jur. 2d Homicide § 13 (1968); 40 C.J.S.Homicide 11(1944). This is precisely what Final Instruction 21 required. Consequently, it was a correct statement of the law and properly given.

Finally, the Grahams argue that the trial court erred when it refused to give their second tendered instruction. That instruction stated:

> "In a prosecution for involuntary manslaughter or reckless homicide, the State must prove to you beyond a reasonable doubt that the defendants, or either of them, inflicted, or caused to be inflicted an injury upon the victim which contributed mediately or immediately

(end of page 12)

> to her death. In other words, before you can find the defendants, or either of them, guilty of either reckless homicide or involuntary manslaughter, you must find that the State has proven beyond a reasonable doubt that the defendants, or either of them, were engaged in unlawful conduct which inflicted or caused to be inflicted an injury upon Sybil Bennett and that the injury was a direct and proximate cause of the death of Sybil Bennett."

Supp. Record at 14. As with most of the other issues raised in this section of their Appellants' Brief, the Grahams have waived appellate consideration of this argument because of their failure to make cogent legal argument and cite to pertinent

authority. Even if this issue had been properly preserved, however, the Grahams would not be entitled to a reversal of their convictions. No error occurs in refusing an instruction if its subject matter is sufficiently covered by instructions actually given. Weekly v. State (1981), Ind. App.., 415 N.E.2d 152, 155. Final Instruction 21 covered the same subject matter as the instruction tendered by the Grahams. Therefore, the trial court committed no error in refusing to give their tendered instruction.

Issue Five

Appellants also assert that the trial court erred in refusing to give several of their tendered instructions which were based on the Indiana Nurse Licensing Statute.[12/] In order to determine whether error results from the trial court's refusal to give a tendered instruction, we must consider whether: (1)the tendered instruction correctly states the law,

(2) there is evidence in the record to support the giving of the instruction, and (3) the substance of the instruction is adequately covered by other instructions which were actually given by the trial court. Van Orden v. State (1984), Ind., 469 N.E.2d 1153, 1161, cert. denied ___U.S. ___, 105 S.Ct. 2335, ___L.Ed.2d___; Davis v. State (1976), 265 Ind. 476, 478, 355 N.E.2d 836, 838. Application of this three-step analysis to the record now before

12/ Indiana Code section 25-23-1-1 et seq.(Burns 1982).

(end of page 13)

us leads inescapably to the conclusion that no error resulted from the refusal of the Grahams' tendered instructions.

The Grahams' tendered instructions numbers 3 and 4 were based on Indiana Code sections 25-23-1-27.1(b)(5), (6) (Burns 1982). Those sections provide in relevant part:

"(b) This chapter does not prohibit:

(5) The gratuitous care of sick, injured, or inform [infirm] individuals by friends or the family of that individual;

(6)The case of the sick, injured, or infirm in the home for compensation if the person assists only:

(A) With personal care;

(B) In the administration of a domestic or family remedy; or

(C) In the administration of a remedy that is ordered by a licensed health care professional and that is within the scope of practice of the licensed health professional under Indiana law;"

These sections delineate certain conduct which is not regulated by the Nurse Licensing Statute. The Grahams were not charged with the unlawful practice of nursing, however. Consequently, the tendered instructions are not applicable to or supported by the facts in the record. No error occurred, therefore, when the trial court refused to give these tendered instructions. See McDonald v. State (1975), 264 Ind. 477, 480, 346 N.E.2d 569, 572; Finton v. State (1963), 244 Ind. 396, 403, 193 N.E.2d 134, 138; Layne v. State (1978), 174 Ind.App.

(1975), 164 Ind. App. 486, 495, 329 N.E.2d 612, 619, trans. denied; 8A I.L.E. Criminal Law §§ 551-552 (1971).

The trial court also refused the Grahams' tendered instruction number 5. That instruction stated:

> "The defendant Ellen Graham has raised the defense that she was not engaged in the unlawful or unauthorized practice of medicine because she was a registered nurse practicing her profession. At all times in question there was in full force and effect a statute of the State of Indiana which provided in pertinent part as follows:
>
> '25-22.5-1-2. Exclusions - This article insofar as it relates to the unlawful or unauthorized practice of medicine or osteopathic medicine shall not apply:

(end of page 14)

> . . . .
>
> (k) To any nurse practicing his profession under I.C. 25-23 . . .'
>
> "I.C. 25-23-1-1 defines registered nurse as follows:
>
> '. . . .
>
> (b) The term "registered nurse" means a person who holds a valid license pursuant to the terms of this chapter, and who bears primary responsibility

and accountability for nursing practices based on specialized knowledge, judgment and skill derived from the principles of biological, physical and behavioral sciences. The registered nurse practices in the profession of nursing by the performance of those activities which include but are not limited to:

(1) Identifying human responses to actual or potential health conditions;

(2) Deriving a nursing diagnosis which identifies the needs of the individual and/or family;

(3) Executing a nursing treatment regimen through the selection, performance and management of nursing interventions based on the nursing diagnosis;

(4) Teaching health care practices;

(5) Advocating the provision of health care services through collaboration with other health service personnel;

(6) Executing regimens as prescribed by a physician with an unlimited license to practice medicine or osteopathic medicine, or a licensed chiropractor, dentist, optometrist, or podiatrist;

(7) Administering, supervising, delegating and evaluating nursing activities; and

(8) Performing nursing acts which are

approved by the Indiana State Board of Nurses' Registration and Nursing Education, or medical acts which are approved by the Indiana State Board of Nurses' Registration and Nursing Education and the Medical Licensing Board;'

"Also in effect at the time the alleged offense was committed is I.C. 25-23-1-1.1 which reads as follows:

'(a) In lieu of the definition of "registered nurse" set out in section 1 [25-23-1-1] of this chapter, as used in this chapter, "registered"

(end of page 15)

nurse" means a person who holds a valid license pursuant to the terms of this chapter, and who bears primary responsibility and accountability for nursing practices based on specialized knowledge, judgment and skill derived from the principles of biological, physical and behavioral sciences.

'(b) As used in this chapter:

(1) "Registered nursing" means performance of services which include, but are not limited to:

(A) Assessing health conditions;
(B) Deriving a nursing diagnosis;
(C) Executing a nursing regimen through the selection, performance, and management of nursing actions based on nursing diagnoses;
(D) Advocating the provision of health care services through collaboration with or referral to other

health professionals;
(E) Executing regimens delegated by a physician with an unlimited license to practice medicine or osteopathic medicine, a licensed dentist, a licensed chiropractor, a licensed optomitrist, or a licensed podiatrist;
(F) Teaching, administration, supervising, and evaluating nursing practice;
(H) Performing acts which are approved by the board or by the board in collaboration with the board of medical registration and examination in Indiana.

(2) "Assessing health conditions" means the collection of data through such means as interview, observation, and inspection for the purpose of:

(A) Deriving a nursing diagnosis;
(B) Identification of need for additional data collection by nursing personnel; and
(C) Identification of need for additional data collection by other health professionals.

(3) "Nursing regimen" means preventive, restorative, maintenance, and promotion activities which include, but are not limited to, meeting or assisting with self-care needs, counseling, and teaching.

'(c) In lieu of the definition of "nursing diagnosis" set out in section 1 of this chapter, as used in this chapter, "nursing diagnosis" means the identification of needs which are amenable to nursing regimen.'

"If you find that the State has not

proven beyond a reasonable doubt that at the time of the alleged offense the defendant Ellen Graham was not a nurse practicing her profession in accordance with the nursing statute, then you should find the defendant Ellen Graham not guilty of the unlawful practice of medicine."

(end of page 16)

Supp. Record at 17-19. As the Grahams correctly point out, they are entitled to an instruction on any defense which has some foundation in the evidence presented at trial, even if that evidence is weak and inconsistent. Harrington v. State (1980), Ind.App., 413 N.E.2d 622, 624, trans. denied. We turn then to a discussion of the evidence relevant to this defense.

During their treatment of Sybil Bennett, the Grahams performed various procedures including enemas, colonic irrigations, pulmentation, and Laetrile injections. At no time did they act under the supervision of a physician licensed to practice medicine in Indiana. Ellen did testify that pulmentations, even when not

done pursuant to a doctor's orders, were part of the common practice of nursing. However, the Grahams point to no evidence that Ellen's other conduct constituted the practice of nursing. There was no evidence presented that a nurse, in practicing his or her profession, could administer Laetrile injections, colonic irrigations, or enemas unless authorized to do so by a doctor licensed in this state. Consequently, the trial court properly refused appellants' tendered instruction 5.

Issue Six

The next issue raised by the Grahams concerns alleged variances. At trial, the state was permitted to introduce evidence that the Grahams conducted urine and saliva tests on Sybil. The state was also allowed to present evidence of the potential for serious harm occasioned by the introduction of water under pressure into the colon during irrigation. During its case-in-chief,

the state also introduced billing statements which detailed the services provided to Sybil and the charges for those services. Finally, the state was able to introduce evidence that the Grahams were charging other individuals for services similar to those provided Sybil. The

(end of page 17)

Grahams now contend that this evidence was at variance from the charges originally filed against them. This argument is, however, without merit.

A variance occurs when there is a difference between the crime charged and the proof adduced at trial. Madison v. State (1955), 234 Ind. 517,531; 130 N.E.2d 35,41: 15 I.L.E. Indictments and Affidavits § 102 (1959); 41 Am.Jur.2d Indictments and Informations § 260 (1968). Therefore, when the charging papers allege that the defendant stole a white horse and the proof at trial establishes that the defendant stole a black horse, a variance exists.

McCalister v. State (1940), 217 Ind. 65,68, 26 N.E.2d 391,392. The Grahams, though, point to no such variance here. They complain, rather, that in addition to the evidence admitted which directly supported the charges against them, evidence of acts not specifically alleged in the information was improperly introduced. In other words, the Grahams claim that a variance occurred because they were charged with the theft of a white horse and at trial the state, in addition to proving that they stole the white horse, also introduced evidence that they stole the black horse. The more appropriate objection in these circumstances would be one based on materiality, relevance or undue prejudice. See United States v. Tandaric (7th Cir.1945), 152 F.2d 3, 6, cert. denied 327 U.S. 786, 66 S.Ct. 703, 90 L.Ed. 1012. The Grahams have failed to establish that a variance existed between the crime charged and the proof

made at trial.

The evidence which the Grahams challenge here was in fact properly admitted. Initially, the billing statements specified the services which the Grahams had provided Sybil. Hence, they were direct evidence of the acts with which the Grahams were charged. In addition, the testimony regarding the potential for serious harm from colonic irrigation tended to show the reckless

(end of page 18)

nature of the Grahams' conduct. Therefore, it was relevant particularly to the reckless homicide charges. See Hare v. State (1984), Ind., 467 N.E.2d 7, 17 (defining relevance). The trial court also properly admitted evidence that the Grahams conducted tests on Sybil's urine and saliva despite the fact that they were not charged for those acts. The tests were performed during the Graham's treatment of Sybil. Thus, this evidence was admissible as part

of the res gestae. Cary v. State (1984), Ind., 469 N.E.2d 459,462; Beasley v. State (1983), Ind., 452 N.E.2d 982,984; Daugherty v. State (1984), Ind.App., 466 N.E.2d 46, 53, trans. denied. Finally, we agree with the Grahams' contention that evidence of crimes not charged is generally inadmissible. See Mason v. State (1984), Ind., 467 N.E.2d 737, 739. However, such evidence is admissible to show intent, motive, purpose, identification, or a common scheme or plan. Hare, at 18; Mason, at 739; Hill v. State (1983), Ind., 445 N.E.2d 994,995. Therefore, the evidence which tended to show that the Grahams were charging other individuals for services similar to those performed for Sybil was also clearly admissible.

Issue Seven

The Grahams also raise a second contention which is closely related to the issue of variance. At trial, the court admitted certain evidence over the Graham-

objections. The evidence challenged here includes the evidence which the Grahams contended was at variance with the charges. In addition, they objected to the definition of quackery elicited during the state cross examination of one of the Grahams' witnesses. Finally, the Grahams also challenged testimony and photographic evidence which depicted the condition of the Hoosier Health House on September 30, 1983, more than one month after Sybil last received treatment at the Grahams' establishment.13/ They assert on appeal that this evidence was irrelevant and unduly prejudicial.

13/ This evidence was gathered during the execution of the search warrant which occurred on September 30, 1983.

(end of page 19)

Consequently, their argument continues, the trial court erred in admitting it. Even if we were to assume, however, that the trial court's various evidentiary

rulings were in error, the Grahams would not be entitled to a new trial.

Errors in the admission of evidence will not entitle a defendant to reversal unless he or she can demonstrate that the alleged errors resulted in some significant harm. Watkins v. State (1984), Ind., 460 N.E.2d 514,515; Groves v. State (1983),Ind., 456 N.E.2d 720,723; Hudak v. State (1983), Ind.App., 446 N.E.2d 615,618. Thus, the burden was clearly on the Grahams to establish the existence of prejudice. In their briefs to this court, however, they merely assert that the allegedly erroneous admission of this evidence substantially prejudiced their rights citing Cox v.State (1981), Ind.App., 422 N.E.2d 357, trans. denied, and Otto v. State (1980), Ind.App., 398 N.E.2d 716, trans. denied. The Grahams have failed to make any cogent argument which specifically explains how these alleged errors resulted in significant

prejudice. Therefore, we must conclude that any error which might have occurred as a result of the admission of this evidence does not warrant reversal.

Issue Eight

Finally, the Grahams assert that there was insufficient evidence to support their convictions. When presented with an attack on the sufficiency of the evidence, our appellate review is necessarily limited. We will neither reweigh the evidence nor judge the credibility of the witnesses. Rather, we will look only to the evidence which supports the verdict and the reasonable inferences which can be drawn from that evidence. If there is substantial evidence of probative value to support the defendant's conviction it will be affirmed. McMillian v. State (1983), Ind., 450 N.E.2d 996,999: Joy V. State (1984), Ind.App., 460 N.E.2d 551,556. Application of these standards (end of page 20)

to the facts contained in the record now before us, leads us to conclude that there was in fact sufficient evidence presented to support each of the Grahams' convictions.

Initially, the Grahams argue that there is no evidence to support their convictions for the unlawful practice of medicine. They assert that these convictions were based in large part on evidence seized pursuant to an invalid search warrant. Consequently, they opine, when that evidence is excluded, there is insufficient evidence to support these convictions. We have already determined, however, that the challenged warrant was valid. Thus, the evidence seized during its execution was not subject to exclusion.

The evidence presented at trial clearly supported the Grahams' convictions for the unlawful practice of medicine. Neither Harry nor Ellen were licensed physicians. However, they examined Sybil, diagnosed

her condition, and prescribed a course of treatment. That treatment included administration of Laetrile injections, pulmentations, enemas, and colonic irrigations. This court recently held that conduct similar to that engaged in by the Grahams constituted the practice of medicine. See State ex rel. Medical Licensing Board v. Stetina (1985), Ind.App., 477 N.E.2d 322, 326-7 (transfer pending). Therefore, there was sufficient evidence to support their convictions for reckless homicide.[14/] The crime of reckless homicide is defined by Indiana Code section 35-42-1-5 (Burns 1985) as follows: "Reckless homicide.--A person who recklessly kills another human being commits reckless homicide, a class C felony." Therefore, to sustain the Grahams' convictions for reckless homicide, there must be some evidence of probative value establishing that the Grahams engaged in reckless conduct which resulted in the

death of Sybil Bennett. See Taylor v.State (1983), Ind.App., 457

14/ The trial court did not enter judgment of conviction on the involuntary manslaughter charges even though the jury returned guilty verdicts on those charges. Consequently, it is unnecessary to specifically discuss the evidence presented in relation to those charges here.

(end of page 21)

N.E.2d 594, 597, n.6. Such evidence was presented here.

The Grahams practiced medicine on Sybil Bennett despite the fact that neither was licensed by the State of Indiana to do so. Following their diagnosis of Sybil's condition, they prescribed and carried out a course of treatment which included the penetration of Sybil's body and the introduction, into her body, of various substances. The state presented uncontradicted evidence that these treatments robbed Sybil of essential fluids and ultimately created an electrolyte imbalance. In fact, by the time Sybil was admitted to

the hospital, the treatments had so seriously weakened her system that she was physically unable to undergo the chemotherapy which could have extended her life. As a result, Sybil died from complications attendant the untreated breast cancer. This is sufficient evidence that the Grahams engaged in reckless conduct which caused the death of another human being.

Essentially, the Grahams assert that there is no evidence to support their convictions for reckless homicide because the state failed to establish that they inflicted any injury on Sybil which was the direct and proximate cause of her death. However, as we pointed out in our discussion of Issue Four, in a homicide prosecution, the state is only required to show that the defendant's conduct contributed mediately or immediately to the death of another person. As our immediately preceding discussion makes clear, the state

met its burden of establishing causation in this case.

Finding no reversible error, the trial court is in all things affirmed.

NEAL, J. and ROBERTSON, J., concur.

(end of page 22)

Official Certified Copy 8/6/86 by Riddle,
Deputy, Delaware County

CRIMINAL DOCKET, SUPERIOR COURT OF DELAWARE COUNTY, NO.1, No. CS 83/43, filed 10/17/83

Action: Ct. I - Involuntary Manslaughter, Class C
Ct. II - Reckless Homicide,Class C
Ct. III - Unlawful Practice,Class C

Plaintiff's Attorney: Michael J.Alexander

Parties: State of Indiana vs Harry Graham

Defendant's Attorney: Jerrald A. Crowell
1900 Fort Wayne Bank Buildings
Fort Wayne, Indiana 46802
(219) 426-4451

Date	Minutes of the Court
10/17/83	Affidavit for Count I,Involuntary Manslaughter, Count II,Reckless Homicide, Count III,Unlawful Practice is filed, it being shown to the Court that Robert E. Robinson has examined an affidavit for probable cause herein and determines that there is sufficient probable cause for

the issue of a warrant for the arrest of the defendant Harry Graham.

10/19/83 Comes now the State of Indiana, by and through Michael Alexander, Prosecutor, and comes now the defendant in person. This cause comes on for initial hearing. The Court informs the defendant of the importance of being represented by counsel and his right to assigned counsel, and if he intends to do so, he must retain counsel within 10 days of the conclusion of this initial hearing this date. The Court advises the defendant of his right to a speedy trial, of the amount and conditions of bail, of his right and privileges against self incrimination, of the minimum and maximum penalty on said charges, and delivers a copy of the charging information which has been filed herein. The Court now enters a preliminary plea of not guilty. The defendant advises the Court that he has obtained

counsel to represent him in this matter. Trial date set on the 27th day of Februart, 1984, at 9:00 a.m. Pre-trial set on January 30, 1984, at 1:30 p.m. Omnibus date set December 16, 1983.

10/20/83 Written Appearance of Jerrald A. Crowell filed as attorney for defendant.

10/20/83 Defendant's Request for Bond Review and Reduction filed by defendant. Hearing set on the 24th day of October, 1983, at 1:30 p.m.

10/24/83 Comes now the State of Indiana, by and through Louis Denny, Deputy Prosecutor for Michael Alexander, Prosecutor, and comes now the defendant, Harry Graham in person and by counsel, Jerrald A. Crowell, all for hearing on Bond Reduction. Evidence heard, arguments had, and the Court hereby takes the matter of Bond Reduction and Property Bond under advisement.

10/27/83 Motion to Compel filed by the

State of Indiana.

10/28/83 On motion of the State of Indiana, cause set for further hearing on the posting of bond on the 31st day of October, 1983, at 8:00 a.m.

(end of page 1)

10/31/83 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney; comes now the defendant in person and by counsel, Jerrald A. Crowell, all for further hearing on Bond. The State now advises the Court that the State has no further evidence to submit on this issue, and the Court being duly and sufficiently advised, finds that property bond submitted to the Court for examination is sufficient for the defendant herein. Property bond approved.

10/31/83 Motion to Compel filed by the State on the 27th day of October, 1983. Motion submitted and examined and the Court being advised finds It is Therefore

Ordered, Adjudged and Decreed by the Court that Harry W. Graham give a sample of his handwriting to Diane Tolliver, of the Indiana State Police Department to be tested and analyzed, all as per signed Court ORDER. No objection from defendant's counsel.

11/2/83 Motion to Produce filed by the defendant. Motion submitted and examined and the Court being advised now grants same and orders the Prosecutor of Delaware County, Indiana to surrender a copy of said transcript forthwith. Any costs of copying shall be borne by the defendants, all as per signed Order.

11/5/83 Comes now the defendant by counsel and makes oral request for return of all money confiscated by the Indiana State Police, pursuant to a certain Search Warrant and now held by the Prosecuting Attorney. The State of Indiana having no objection, request is granted.

11/9/83 Disclosure of Inventory filed by the State of Indiana.

11/10/83 State's Reply to Defendant's Motion to Produce filed together with Request for Discovery and State's Motion in Limine filed by the State.

11/10/83 State's Request for Discovery submitted and examined and the Court being advised finds that It is Therefore Ordered, Adjudged and Decreed by the Court that the defendant or his attorney is ordered to produce all items herein requested on or before the 30th day of November, 1983, all as per signed Order.

11/10/83 Motion in Limine filed by the State, submitted, examined and approved, all as per signed Order.

12/16/83 Motion to Suppress filed by the defendant.

12/22/83 Motion to Dismiss filed by the defendant. Cause set for hearing on defendant's Motion to Suppress and Motion

to Dismiss on the 5th day of January, 1984 at 10:00 a.m. Parties notified.

1/5/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney; comes now the defendant in person and by counsel, Jerrald Crowell; all for hearing upon defendant's Motion to Suppress and Motion to Dismiss. No additional evidence is offered on defendant's Motion to Suppress by the defendant. The State of Indiana offers no evidence on defendant's Motion to Suppress. Arguments made and the State is granted until January 10, 1984 to file a written memorandum. The Motion to Suppress is taken under advisement pendin submission of memorandum. Further, argument now presented on defendant's Motion to Dismiss. Cause concluded and the Court finds that the instant statute is not impermissably vague and unconstitutional and therefore, defendant's

Motion to Dismiss is now denied and overruled.

1/24/84 Motion for Severance of Offenses and Defendants filed by the defendants. Motion set for hearing on the 30th day of January, 1984 at 1:30 p.m. Parties notified.

1/30/84 On motion of defendant, cause set for hearing on Motion for Severance of Offenses and Defendants on this date, continued until February 2, 1984 at 10:00 a.m. Parties notified.

2/1/84 State's Objection to Defendant's Motion for Severance filed by the State on Indiana.

(end of page 2)

2/2/84 Comes now the State of Indiana by and through the Prosecuting Attorney, Michael J. Alexander; comes now the defendant by counsel, Jerrald A.Crowell; all for hearing upon Motion for Severance of Offenses and Defendants and for

pre-trial conference. Cause submitted, arguments had and the Court finds as follows: That the Motion to Suppress, heretofore taken under advisement by the Court on January 5, 1984, should be, and it is now, denied. Further, the Court finds that the Motion for Severance of Defendants is now moot; the Court having previously granted a Motion for Separate trial filed by Donna Jean Justinen. Arguments heard on defendant's Motion for Severance of Offenses and the Court being advised, finds that said Motion is not well taken, should be, and it is hereby, denied. Counsel for the defendant and the State of Indiana agree that Harry Graham and Ellen Graham should be tried on the same date, therefore a trial date of February 27, 1984 at 9:00 a.m. is confirmed as to both defendants.

2/13/84 Motion Pursuant to Admission and Disciplinary Rule filed by the defendant.

2/16/84 Defendant's Supplemental Response to State's Motion for Discovery filed by the defendant together with Motion for disclosure of Plea Bargain.

2/17/84 Motion to Subpoena Material Witness filed by the State of Indiana together with Certificate of Official Character of Prosecuting Attorney; Certificate Determining Individual to be Material Witness Under Uniform Act to Secure Attendance of Witness. Motion to Subpoena Material Witness submitted and examined and the Court being advised finds that It is Therefore Ordered that the Clerk of the Montgomery County Ohio District Court issue a subpoena with copies of the Delaware County, Indiana Superior Court's Certificate and check attached, directing David D. Goldberg to attend and give testimony on Monday, February 27, 1984, at 9:00 a.m. Eastern Standard Time in the Delaware County

Superior Courtroom in the Courthouse in the City of Muncie, Indiana, all as per signed Order.

2/17/84 Motion for Disclosure of Plea Bargain filed by the defendant on the 16th day of February, 1984 submitted, examined and approved, all as per signed Order.

2/21/84 State's Admended Discovery filed by the State.

2/23/84 Deposition of Gail Heiland received and filed.

2/24/84 Deposition of Jack Bennett received and filed.

2/24/84 Errata Sheet filed as to Deposition of Gail Heiland.

(end of page 3)

2/24/84 Trial Brief filed by the defendant.

2/27/84 Comes now the State of Indiana by and through Michael J. Alexander; comes now the defendant in person and by counsel, Jerrald A.Crowell. The Court, with

the agreement of all parties, finds that due to inclement weather, this trial should be continued. A tentative date of March 19, 1984 at 9:00 a.m. is now set. Counsel for defendant to confirm said date as soon as possible.

3/19/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, Jerrald Crowell and the proceedings for the selection of the jury for the trial of this cause is commenced and comes now the regular venire of the jury panel, being first duly sworn as to their qualifications to serve as jurors and said examination being concluded, the following persons are sworn to try and determine the issues herein as follows: James Schaffner; Tomas May, Ola Rhodes, Gilbert Westerman, Daniel Copeland, Frank

Johnson, Ellen Graves, George Larkin, Barbara Cassell, Dorothy Hudson, Mary Titus, Ronald Ramsey, Teresa Windsor. The Court reads its preliminary instructions. The defendant makes oral Motion for Separation of Witnesses. Said Motion granted. The Court now grants the request of David Harrison to be permitted to practice law in Indiana for the duration of this trial only; David Harrison being admitted to practice law in the State of Michigan. Opening statement made by the State of Indiana. Opening Statement made by the defendant. The State of Indiana begins presentation of its case-in-chief and there being insufficient time to conclude this matter, cause continued until March 20, 1983 at 9:00 a.m.

3/20/84 Comes now the State of Indiana by and through Michael J. Alexander and Richard Reed; comes now the defendant, in person and by counsel, Jerrald Crowell

and David Harrison. Comes now the Jury in its entirety. The State resumes presentation of its case-in-chief and there being insufficient time to conclude this matter, cause continued until March 21, 1984, at 9:00 a.m.

3/21/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, Jerrald Crowell and David Harrison. Comes now the Jury in its entirety. The State presents the remainder of its case-in-chief and rests. The defendant files a written Motion for Judgment on the Evidence and overruled on all three counts charged against the defendant. Defendant begins presentation of his case-in-chief and there being insufficient time to conclude this matter, cause continued until March 22, 1984 at 9:00 a.m.

3/22/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney, and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, Jerrald Crowell and David Harrison, Comes now the Jury in its entirety. The defendant presents the remainder of his case-in-chief and rests. The State presents rebuttal evidence and rests. There being insufficient time to conclude this matter, cause continued until March 23, 1984 at 9:00 a.m.

3/23/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney, and comes now the defendant in person and by counsel,Jerrald Crowell and David Harrison; comes now the Jury in its entirety. Defendant files a Motion for Judgment on Evidence, said Motion denied by the Court on all three counts charged in the Informations. The

defendant makes final arguments. The State makes its summation. Arguments had on final instructions. The defendant tenders 10 instructions numbered 1 through 10. The Court gives defendant's tendered instruction 1 as modified and renumbered Court's Instruction 20, defendant's tendered instruction 7 as Court's Instruction 27; defendant's tendered instruction 9 as Court's Instruction 40; defendant's tendered instruction 10 as Court's Instruction 18. The Court refuses defendant's tendered instructions numbered 2,3,4,5,6. The State of Indiana tenders 7 proposed instructions numbered 1 through 7. State's tendered instruction 1 given as Court's Instruction 23, State's tendered instruction 2 given as Court's Instruction 25. State's instructions 4, 5, 6 are refused. The Court reads its final instructions numbered 1 through 43. The jury retires to

deliberate its verdict at 4:40 p.m.

(end of page 4)

3/24/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney, and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, Jerrald Crowell and David Harrison. Comes now the jury by its foreperson, James Schaffner and renders its verdicts at 1:05 a.m. as follows: Count I-We, the Jury, find the defendant, Harry W. Graham, Guilty of Involuntary Manslaughter, a Class C Felony. Dated: March 24, 1983. [1984] Foreperson, James Schaffner. Count II-We, the Jury, find the defendant, Harry W. Graham, Guilty of Reckless Homicide, a Class C Felony. Dated March 24, 1983. [1984.] Foreperson, James Schaffner. Count III-We, the Jury, find the defendant, Harry W. Graham, Guilty of the Unlawful Practice of Medicine, a Class C

Felony. Dated March 24, 1984. Foreperson, James Schaffner. The Court now enters Judgment of Conviction on Count II, Reckless Homicide, a Class C Felony and Count III, the Unlawful Practice of Medicine, a Class C Felony, against the defendant, Harry W. Graham. Sentencing to be held April 16th, 1984 at 1:30 p.m. The Probation Officer of this Court is directed to prepare a pre-sentence investigation report prior to the sentencing date. The defendant is remanded into the custody of the Delaware County Sheriff.

4/26/84 Comes now the State of Indiana by and through Richard Reed, Chief Deputy Prosecutor, for the Prosecuting Attorney, Michael J. Alexander. Comes now the defendant, Harry W. Graham, in person and by counsel, Jerrald Crowell; all for sentencing. Comes now Elmer Ashley, Probation Officer of this Court and files his pre-sentence investigation report. The

Court advises that it approves the presentence investigation report. The defendant submits evidence. On the conviction of the defendant, Harry W. Graham, and the Court having entered Judgment against the defendant for the offense in Count II, Reckless Homicide, a Class C Felony, and the Court having entered Judgment against the defendant for the offense in Count III, Unlawful Practice of Medicine, a Class C Felony: the Court now finds that the following mitigating factors exist: 1. The age of the defendant. 2. The fact that the defendant does not have a prior criminal record. 3.His record of military service. However, balancing against those named mitigating factors are the following factors which would not be favorable to the imposition of a suspended sentance: 1. A suspended sentence would depreciate the seriousness of this crime. 2. The victim of the crime

was physically infirm. 3. Also, the very facts and circumstances of this case including there being a dealth involved, tend to weigh against a suspended sentence. 4.The recklessness demonstrated by the defendant. 5. Jury found the defendant guilty on all three counts charged even though judgment was entered in only two charges. However, in weighing all circumstances and factors, the Court finds that the mitigating factors do outweigh the aggravating factors and the Court now sentences the defendant, Harry W. Graham, for the offense of Reckless Homicide, a Class C Felony, Count II, to the Department of Corrections for a period of 3 years. Further, defendant to pay a fine of $5,000.00 and court costs. As to Count III, the Unlawful Practice of Medicine, the Court sentences the defendant, Harry W. Graham, to the Department of Corrections, for a period of three (3)

years, said sentence to run concurrently with the sentence imposed in Count II, and to pay court costs. Further, defendant given credit for time served as a result of this charge. Defendant is advised of his right to file a Motion to Correct Errors within 60 days. Defendant informs the Court that he

(end of page 5)

wishes to file a Motion to Correct Error and requests to be released on bond pending appeal. Upon request of Defendant, the Court now sets Appeal Bond in the amount of $15,000.00 upon certain conditions. Finally, for the reason the law in this State provides that the defendant can only be sentenced upon one homicide, the Court will not impose a sentence as to Count I-Involuntary Manslaughter.

4/26/84 Property Bond examined and approved.

6/15/84 Motion to Correct Errors filed by

the defendant.

6/27/84 Motion to Correct Errors filed by the defendant set for hearing on the 5th day of July, 1984 at 2:00 p.m. Parties notified.

6/29/84 Due to congestion of the Court, cause set for hearing on the 5th day of July, 1984 continued until July 10th, 1984 at 1:30 p.m. Parties notified.

7/10/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney; comes now the defendant by counsel, Jerrald Crowell; all for hearing on defendant's Motion to Correct Errors. Cause submitted, arguments made and the Court being advised, finds that said Motion should be, and it is hereby, Overruled.

7/18/84 Praecipe for Records filed by the defendant.

10/1/84 Letter from Court of Appeals received and filed.

11/1/84 Letter from Court of Appeals received and filed.

11/16/84 Bill of Exceptions filed by the Court.

1/17/85 Affidavit of the Honorable Robert L. Barnet, Judge filed.

7/26/85 Letter from Court of Appeals received and filed.

8/26/85 Letter from Court of Appeals received and filed.

9/20/85 Letter from Court of Appeals received in reference to Petition for Rehearing and filed.

10/22/85 Letter from Court of Appeals of Indiana received and filed.

1/6/86 Comes now Elmer Ashley, Adult Probation Officer of this Court, and informs the Court he has given permission to Harry Graham to leave the jurisdiction of this Court and travel to the home of Everett Graham at 80 Elkenberg St.,South Haven, Michigan 49090 from January 7,

1986 until January 12, 1986.

3/4/86 Notice of Certification of Opinion filed by the Court of Appeals.

(end of page 6)

3/5/86 Certified Opinion from the Court of Appeals of Indiana received and filed.

3/6/86 The Court, noting the Petition for Transfer filed by the defendant with the Supreme Court of Indiana has been Denied, now directs the defendant to surrender himself prior to March 11, 1986 at 4:00 p.m., to the custody of the Delaware County Sheriff at his office, pursuant to appeal bond, for execution of previously imposed sentences.

3/11/86 Petition to Remain Free on Appeal Bond Pending Appeal to the United States Supreme Court filed by the defendant, Harry W. Graham.

3/11/86 Withdrawal of Appearance filed by Jerrald Crowell.

3/11/86 The Court, having reviewed the

Petition to Remain Free on Appeal Bond Pending Appeal to the United States Supreme Court and noting that sentence upon the defendant was imposed on April 24, 1984 and further noting this Court is not aware of any pending appeals filed in any Federal Court, now Finds said Petition to Remain Free on Appeal Bond Pending Appeal to the United States Supreme Court is not well taken and should be, and it is hereby, Denied. (Mr. Crowell's office notified.)

3/11/86 Letter from the Court of Appeals showing Appellant's Petition for Transfer Denied received and filed.

4/18/86 Copy of Application for Extension of Time for the Purpose of Filing Writ of Certiorari filed by defendant, Harry W. Graham.

5/1/86 Copy of Request for Extension of Time filed in the U. S. Supreme Court filed by defendant.

(end of page 7)

5/2/86 Petition to be Free Pending Appeal to the United States Supreme Court filed by the defendant.

5/7/86 The Court now directs the State of Indiana to respond to the Petition to be Free Pending Appeal to the United States Supreme Court filed by the defendant on or before May 17, 1986.

5/22/86 The following entry is made nunc pro tunc for May 8, 1986: State's Reply To Petition To Be Free Pending Appeal To The United States Supreme Court received and filed.

5/22/86 The Court, having reviewed Defendant's Petition To Be Free Pending Appeal To The United States Supreme Court and the Reply filed by the State of Indiana, now finds defendant's petition is not well taken and should be, and it is hereby, Denied. (Defendant and the State issued copy of the docket sheet.)

5/23/86 Notice of Appeal To The Supreme

Court Of The United States filed by the defendant.

5/29/86 Copy of Appeal to the United States Supreme Court filed by the defendant.

6/12/86 Copy of Appeal to the United States Supreme Court filed by the defendant.

6/24/86 Appendix for Writ of Certiorari filed by the defendant.

6/25/86 Copy of Motion to Stay Enforcement of Judgment which is Sought to Be Reviewed by Petition for Writ of Certiorari in this cause filed by the defendant in the United States Supreme Court received and filed.

7/21/86 Petition to Be Free and Stay Judgment Pending Appeal to the United States Supreme Court filed by defendants.

(end of page 8)

Official Certified Copy 8/6/86 by Riddle,
Deputy, Delaware County

CRIMINAL DOCKET, SUPERIOR COURT OF DELAWARE COUNTY, NO.1, No. CS 83/44, filed 10/17/83

Action: Ct. I - Involuntary Manslaughter, Class C

Ct. II - Reckless Homicide, Class C

Ct. III - Unlawful Practice, Class C

Plaintiff's Attorney: Michael J. Alexander

Parties: State of Indiana vs Ellen Graham

Defendant's Attorney: Jerrald A. Crowell
1900 Fort Wayne Bank Buildings
Fort Wayne, Indiana 46802
(219) 426-4451

Date — Minutes of the Court

10/17/83 Affidavit for Count I, Involuntary Manslaughter, Count II, Reckless Homicide, Count III, Unlawful Practice is filed, it being shown to the court that Robert E. Robinson has examined an affidavit for probable cause herein and determined that there is sufficient probable cause for

the issue of a warrant for the arrest of the defendant Ellen Graham.

10/19/83 Comes now the State of Indiana, by and through Michael Alexander, Prosecutor, and comes now the defendant, in person. This cause comes on for initial hearing. The Court informs the defendant of the importance of being represented by counsel and her right to assigned counsel, and if she intends to do so, she must retain counsel within 10 days of the conclusion of this initial hearing this date. The court advises the defendant of her right to a speedy trial, of the amount and conditions of bail, of her right and privileges against self incrimination, of the nature of the charges against her, of the minimum and maximum penalty on said charges, and delivers a copy of the charging information which has been filed herein. The Court now enters a preliminary plea of not guilty. The defendant

advises the Court that she has contacted counsel in this matter and said counsel to represent said defendant in this matter. The Court now sets this matter for trial on the 27th day of February, 1984 at 9:00 a.m. Pre-trial set on the 30th day of January, 1984, at 1:30 p.m. Omnibus date set December 16, 1983.

10/20/83 Written Appearance of Jerrald A. Crowell filed on behalf of the defendant.

10/20/83 Defendant's Request for Bond Review and Reduction filed by defendant. Motion set for hearing on the 24th day October, 1983, at 1:30 p.m.

10/24/83 Comes now the State of Indiana, by and through Louis Denny, Deputy Prosecutor for Michael Alexander, Prosecutor, and comes now the defendant, Ellen Graham, in person and by counsel, Jerrald A. Crowell, all for hearing on Bond Reduction. Evidence heard, arguments had, the Court hereby takes the matter of Bond

Reduction and Property Bond under advisement.

(end of page 1)

10/27/83 Motion to Compel filed by the State of Indiana.

10/28/83 On motion of the State, cause set for further hearing on the posting of bond on the 31st day of October, 1983 at 8:00 a.m. Parties notified.

10/31/83 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney; comes now the defendant in person and by counsel, Jerrald A. Crowell; all for further hearing on Bond. The State now advises the Court that there is no further evidence on this issue and the Court being duly and sufficiently advised finds that the property bond submitted to the Court for examination is sufficient for the defendant herein. Property bond approved.

10/31/83 Motion to Compel filed by the

State on the 27th day of October, 1983. Motion submitted and examined and the Court being advised finds that It Is Therefore Ordered, Adjudged and Decreed by the Court that Ellen Graham give a sample of her handwriting to Diane Tolliver of the Indiana State Police Department to be tested and analyzed, all as per signed Order. No objection from defendant's counsel.

11/2/83 Motion to Produce filed by the defendant. Motion submitted and examined and the Court being advised now grants same and orders the Prosecutor of Delaware County, Indiana, to surrender a copy of said transcript forthwith. Any costs of copying shall be borne by the defendants, all as per signed Order.

11/3/83 Motion for Discovery filed by the defendant. Motion submitted, examined and approved, all as per signed Order.

11/5/84 [83] Comes now the defendant by

counsel and makes oral request for return of all money confiscated by the Indiana State Police, pursuant to a certain Search Warrant and now held by the Prosecuting Attorney. The State of Indiana having no objection, request is granted.

11/9/83 Disclosure of Inventory filed by the State of Indiana.

11/10/83 State's Reply to Defendant's Motion to Produce filed together with Request for Discovery and Motion in Limine filed by the State.

11/10/83 Request for Discovery filed by the State submitted and examined and the Court being advised finds that It is Therefore Ordered, Adjudged and Decreed by the Court that the defendant or his attorney is ordered to produce all items herein requested on or before the 30th day of November, 1983, all as per signed Order.

11/10/83 Motion in Limine filed by the

State of Indiana, submitted, examined and approved, all as per signed Order.

12/16/83 Motion to Suppress filed by the defendant.

12/22/83 Motion to Dismiss filed by the defendant. Motion to Suppress and Motion to Dismiss set for hearing on the 5th day of January, 1984 at 10:00 a.m. Parties notified.

1/5/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney; comes now the defendant in person and by counsel,Jerrald Crowell; all for hearing upon defendant's Motion to Suppress and Motion to Dismiss. No additional evidence is offered on defendant's Motion to Suppress by the defendant. The State Offers no evidence on defendant's Motion to Suppress. Arguments made and the State is granted until January 10, 1984 to file a written memorandum. The Motion to Suppress is taken

under advisement pending submission of memorandum. Further argument now presented on defendant's Motion to Dismiss. Cause concluded and the Court now finds that the instant statute is not impermissably vague and unconstitutional and therefore defendant's Motion to Dismiss is now denied and overruled.

1/24/84 Motion for Severance of Offenses and Defendants filed by the defendants. Motion set for hearing on the 30th day of January, ,1984 at 1:30 p.m.

(end of page 2

1/30/84 On motion of defendant, cause set for hearing on Motion for Severance of Offenses and Defendants on this date, continued until February 2, 1984 at 10:00 a.m. Parties notified.

2/1/84 State's Objection to Defendant's Motion for Severance filed by the State of Indiana.

2/2/84 Comes now the State of Indiana by

and through the Prosecuting Attorney, Michael J. Alexander; comes now the defendant by counsel, Jerrald Crowell; all for hearing upon Motion for Severance of Offenses and defendants and for pre-trial conference. Cause submitted, arguments had and the Court finds as follows: That the Motion to Suppress, heretofore taken under advisement by the Court on January 5, 1984, should be, and it is now, denied. Further, the Court finds that the Motion for Severance of Defendants is now moot; the Court having previously granted a Motion for Separate Trial filed by Donna Jean Justinen. Arguments heard on defendant's Motion for Severance of Offenses and the Court being advised finds that said Motion is not well taken, should be, and it is hereby, denied. Counsel for the defendant and the State of Indiana agree that Harry Graham and Ellen Graham should be

tried on the same date, therefore a trial date of February 27, 1984 at 9:00 a.m. is confirmed as to both defendants.

2/13/84 Motion Pursuant to Admission and Disciplinary Rule 3 filed by the defendant.

2/16/84 Defendant's Supplemental Response to State's Motion for Discovery filed by the defendant together with Motion for Disclosure of Plea Bargain.

2/17/84 Motion to Subpoena Material Witness filed by the State of Indiana together with Certificate of Official Character of Prosecuting Attorney; Certificate Determining Individual to be Material Witness Under Uniform Act to Secure Attendance of Witness. Motion to Subpoena Material Witness submitted and examined and the Court being advised finds that It is Therefore Ordered that the Clerk of the Montgomery County Ohio District Court issue a

subpoena, with copies of the Delaware County, Indiana Superior Court's Certificate and check attached, directing David Goldberg to attend and give testimony on Monday, February 27, 1984 at 9:00 a.m. Easter [Eastern] Standard Time in the Delaware County Superior Courtroom in the Court house in the City of Muncie, Indiana, all as per signed Order.

2/17/84 Motion for Disclosure of Plea Bargain filed by the defendant on the 16th day of February, 1984 submitted, examined and approved, all as per signed Order.

2/21/84 State's Amended Discovery filed by the State of Indiana.

2/23/84 Deposition of Gail Heiland received and filed.

2/24/84 Deposition of Jack Bennett received and filed.

(end of page 3)

2/27/84 Trial Brief filed by the defendant.

2/27/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney; comes now the defendant in person and by counsel, Jerrald A. Crowell. The Court, with the agreement of all parties, finds that due to inclement weather, this trial should be continued. A tentative date of March 19,1984 at 9:00 a.m. is now set. Counsel for defendant to confirm said date as soon as possible.

3/19/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney, and Richard Reed, Chief Deputy Prosecutor; comes now the defendant Ellen Graham in person and by counsel, Jerrald Crowell; and the proceedings forthe selection of the jury for the trialof this cause is commenced and comes now the regular venire of the jury panel, being first duly sworn as to their qualifications to serve as jurors and said examination being concluded, the

following persons are sworn to try and determine the issues herein as follows: James Schaffner: Thomas May, Lola Rhodes, Gilbert Westerman, Daniel Copeland, Frank Johnson, Ellen Graves, George Larkin, Barbara Cassell, Dorothy Hudson, Mary Titus, Ronald Ramsey, Teresa Windsor. The Court reads its preliminary instructions. The defendant makes an oral Motion for Separation of Witnesses. Said Motion granted. The Court now grants the request of David Harrison to be permitted to practice law in Indiana for the duration of this trial only; David Harrison being admitted to practice law in the State of Michigan. Opening Statement made by the State of Indiana. Opening Statement made by the defendant. The State of Indiana begins presentation of its case-in-chief and there being insufficient time to conclude this matter, cause continued until March 20,

1984 at 9:00 a.m.

3/20/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, Jerrald Crowell and David Harrison. Comes now the jury in its entirety. The State resumes presentation of its case-in-chief and there being insufficient time to conclude this matter, cause continued until March 21, 1984 at 9:00 a.m.

3/21/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, David Harrison and Jerrald Crowell. Comes now the jury in its entirety. The State presents the remainder of its case-in-chief and rests. The defendant files a written Joint Motion for Judgment on the Evidence.

Arguments made on said Motion and the Court denies the Motion for Judgment on the Evidence and overrules on all three counts charged against the defendant. Defendant begins presentation of its case-in-chief and there being insufficient time to conclude this matter, cause continued until March 22, 1984 at 9:00a.m

3/22/84 Comes now the State of Indiana by and through Michael J.Alexander, Prosecuting Attorney, and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, Jerrald Crowell and David Harrison. Comes now the jury in its entirety. The defendant presents the remainder of her case-in-chief and rests. The State presents rebuttal evidence and rests. There being insufficient time to conclude this matter, cause continued until March 23, 1984 at 9:00 a.m.

3/23/84 Comes now the State of Indiana by

and through Michael J.Alexander, Prosecuting Attorney and Richard Reed, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, David Harrison and Jerrald Crowell. Comes now the Jury in its entirety. Defendant files a Motion for Judgment on Evidence, said Motion denied by the Court on all three counts charged in the Informations. The State makes its final argument. The defendant makes final arguments. The State makes its Summation. Arguments had on Final Instructions. The defendant tenders 10 instructions numbered 1 through 10. The Court gives defendant's tendered instruction 1 as modified and renumbered Court's Instruction 20; defendant's tendered instruction 7 as Court's Instruction 27; defendant's tendered instruction 9 as Court's Instruction 40; and defendant's tendered instruction 10 as Court's Instruction 18.

The Court refuses defendant's tendered instructions numbered 2,3,4,5,6. The State of Indiana tenders seven proposed instructions numbered 1 through 7. State's tendered instruction 1 given as Court's Instruction 23; State's tendered instruction 2 given as Court's instruction 25. State's instructions 4,5,6 are refused. The Court reads its final instructions numbered 1 through 43. The Jury retires to deliberate its verdict at 4:40 p.m.

(end of page 4)

3/24/84 Comes now the State of Indiana by and through Michael J. Alexander, Prosecuting Attorney, and Richard Reed,, Chief Deputy Prosecutor; comes now the defendant in person and by counsel, Jerrald Crowell and David Harrison. Comes now the Jury by its foreperson, James Schaffner and renders its verdicts at 1:05 a.m. as follows: Count I-We, the Jury, find

the defendant, Ellen Graham, Guilty of Involuntary Manslaughter, a Class C Felony. Dated March 24, 1984. Foreperson: James Schaffner, Count II-We, the Jury, find the defendant, Ellen Graham, Guilty of Reckless Homicide, a Class C Felony. Dated: March 24, 1984. Foreperson, James Schaffner. Count III-We, the Jury, find the defendant, Ellen Graham, Guilty of the Unlawful Practice of Medicine, a Class C Felony. Dated March 2[24] 1984, Foreperson, James Schaffner. The Court now enters Judgment of Conviction on Count II, Reckless Homicide, a Class C Felony and Count III, the Unlawful Practice of Medicine, a Class C Felony, against the defendant. Sentencing to be held April 16, 1984, at 1:30 p.m. The Probation Officer of this Court is directed to prepare a pre-sentence investigation report prior to the sentencing date. The defendant is remanded into the

custody of the Delaware County Sheriff.

4/26/84 Comes now the State of Indiana by and through Richard Reed, Chief Deputy Prosecutor, for the Prosecuting Attorney, Michael J. Alexander. Comes now the defendant Ellen Graham, in person and by counsel, Jerrald Crowell; all for sentencing. Comes now Elmer Ashley, Probation Officer of this Court, and files his pre-sentence investigation report. The Court advises that it approves the pre-sentence investigation report. The defendant submits evidence. On the conviction of the defendant, Ellen Graham, and the Court having entered Judgment against the defendant for the offense in Count II Reckless Homicide, a Class C Felony, and the Court having entered Judgment against the defendant for the offense in Count III, Unlawful Practice of Medicine, a Class C Felony; the Court now finds that the following mitigating factors exist:

1. The age of the defendant. 2. The fact that the defendant does not have a prior criminal record. 2. [3.] The imprisonment of this defendant would result in hardship to herself; 3. [4.] Her record of service as a nurse. However, balancing against those named mitigating factors are the following factors which would not be favorable to the imposition of a suspended sentence: 1. A suspended sentence would depreciate the seriousness of this crime. 2. The victim of the crime was physically infirm. 3. Also, the very facts and circumstances of this case including there being a death involved, tend to weigh against a suspended sentence. 4. The recklessness demonstrated by the defendant. 5. Jury found the defendant guilty on all three counts charged even though judgment was entered in only two charges. However, in weighing all circumstances and factors, the Court finds

that the mitigating factors do outweigh the aggravating factors and the Court now sentences the defendant, Ellen Graham, for the offense of Reckless Homicide, a Class C Felony, Count II, to the Department of Corrections for a period of 3 years. Further, the defendant to pay a fine of $5,000.00 and Court costs. As to Count III the Unlawful Practice of Medicine, the Court sentences the defendant, Ellen Graham to the Department of Corrections for a period of three years, said sentence to run concurrently with the sentence imposed in Count II, and to pay court costs. Further, defendant given credit for time served as a result of this charge. Defendant is advised of her right to file a Motion to Correct Errors within 60 days. Defendant informs the Court that she wishes to file a Motion to Correct Errors and requests to be released on bond pending appeal. Upon

request of defendant, the Court

(end of page 5)

now sets Appeal Bond in the amount of $15,000 upon certain conditions. Finally, for the reason the law in this State provides that the defendant can only be sentenced upon one homicide, the Court will not impose a sentence as to Count I--Involuntary Manslaughter.

4/26/84 Property Bond examined and approved.

6/15/84 Motion to Correct Errors filed by the defendant.

6/27/84 Motion to Correct Errors filed by the defendant set for hearing on the 5th day of July, 1984 at 2:00 p.m. Parties notified.

6/29/84 Due to congestion of the Court, cause set for hearing on the 5th day of July, 1984 continued until July 10th, 1984 at 1:30 p.m. Parties notified.

7/10/84 Comes now the State of Indiana by and through Michael J. Alexander,

Prosecuting Attorney; comes now the defendant in by counsel, Jerrald A.Crowell; all for hearing on defendant's Motion to Correct Errors. Cause submitted, arguments made and the Court being advised, finds that said Motion should be, and it is hereby, Overruled.

7/18/84 Praecipe for Records filed by the defendant:

10/1/84 Letter from Court of Appeals received and filed.

11/1/84 Letter from Court of Appeals received and filed.

11/16/84 Bill of Exceptions filed by the Court.

1/17/85 Affidavit of the Honorable Robert L. Barnet filed.

7/26/85 Letter from Court of Appeals received and filed.

8/26/85 Letter from Court of Appeals received and filed.

9/20/85 Letter from Court of Appeals

received in reference to Petition for Rehearing and filed.

10/22/85 Letter from Court of Appeals of Indiana received and filed.

1/6/86 Comes now Elmer Ashley, Adult Probation Officer of this Court, and informs the Court he has given permission to Ellen Graham to leave the jurisdiction of this Court and travel to 80 Elkenberg St.,South Havan, Michigan 49090 from January 7, 1986 until January 12, 1986.

3/4/86 Notice of Certification of Opinion filed by the Court of Appeals.

(end of page 6)

3/5/86 Certified Opinion from the Court of Appeals of Indiana received and filed.

3/6/86 The Court, noting the Petition for Transfer filed by the defendant with the Supreme Court of Indiana has been Denied now directs the defendant to surrender herself, prior to March 11, 1986 at

4:00 p.m. to the custody of the Delaware County Sheriff at his office, pursuant to appeal bond, for execution of previously imposed sentences.

3/11/86 Petition to Remain Free on Appeal Bond Pending Appeal to the United States Supreme Court filed by the defendant, Ellen Graham.

3/11/86 Withdrawal of Appearance filed by Jerrald Crowell.

3/11/86 The Court, having reviewed the Petition to Remain Free on Appeal Bond Pending Appeal to the United States Supreme Court and noting that sentence upon the defendant was imposed on April 24, 1984 and further noting this Court is not aware of any pending appeals filed in any Federal Court, now Finds said Petition to Remain Free on Appeal Bond Pending Appeal to the United States Supreme Court is not well taken and should be, and it is hereby, Denied.

(Mr. Crowell's office notified.)

3/11/86 Letter from the Court of Appeals showing Appellant's Petition for Transfer Denied received and filed.

4/18/86 Copy of Application for Extension of Time for the Purpose of Filing Writ of Certiorari filed by defendant, Ellen Graham.

5/1/86 Copy of Request for Extension of Time filed in the U.S.Supreme Court filed by the defendant.

(end of page 7)

5/2/86 Petition to be Free Pending Appeal to the United States Supreme Court filed by the defendant.

5/7/86 The Court now directs the State of Indiana to respond to the Petition to be Free Pending Appeal to the United States Supreme Court filed by defendant on or before May 17, 1986.

5/22/86 The following entry is made nunc pro tunc for May 8, 1986: State's Reply

to Petition to Be Free Pending Appeal to the United States Supreme Court received and filed.

5/22/86 The Court, having reviewed Defendant's Petition To Be Free Pending Appeal To The United States Supreme Court and the Reply filed by the State of Indiana, now finds defendant's petition is not well taken and should be, and it is hereby, Denied. (Defendant and the State issued copy of docket sheet.)

5/23/86 Notice of Appeal to the Supreme Court of the United States filed by the defendant.

5/29/86 Copy of Appeal to the United States Supreme Court filed by defendant. (copy placed in file no.CS 83-43.)

6/12/86 Copy of Appeal to the United States Supreme Court filed by defendant.

6/24/86 Appendix for Writ of Certiorari filed by the defendant.

7/1/__[86] Copy of Motion to Stay

Enforcement of Judgment Which is Sought to be Reviewed by Petition for Writ of Certiorari in this Cause filed by defendant in the United States Supreme Court received and filed.

7/21/86 Petition to be Free and Stay Judgment Pending Appeal to the United States Supreme Court filed by defendants. (copy placed in file no. CS 83-43.)

7/31/86 Motion for Shock Probation filed by defendant, Ellen Graham.

(end of page 8)

STATE OF INDIANA)
) SS:
DELAWARE COUNTY)

IN THE DELAWARE SUPERIOR
COURT No. 1, 1984 TERM

STATE OF INDIANA

VS.

HARRY GRAHAM CAUSE NO. CS-83/43

STATE OF INDIANA

VS.

ELLEN GRAHAM CAUSE NO. CS-83/44

FINAL (JURY) INSTRUCTIONS

Instruction No. 1

Since this is a criminal case the Constitution of the State of Indiana makes you the judges of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the Court are the best source as to the law applicable to this case.

Instruction No. 2

You are to be governed solely by the evidence introduced in this trial and the law as you find it to be. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Both the plaintiff and defendant have a right to demand, and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences of that verdict may be.

Instruction No. 3

You should give separate consideration to each defendant. Each is entitled to have his case decided on the evidence and the law which is applicable to him.

Instruction No. 4

This is a criminal case brought against the defendant, Harry W. Graham, by the State of Indiana. The case was commenced by the filing of an information, as to Count I, filed by the Prosecuting Attorney on the 17th day of October, 1983. That Information omitti(ng) formal parts, reads as follows:

Richard McCord swears he is informed and believes that Harry W. Graham, on or about September 11, 1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully, kill another human being, to-wit: Sybil A. Bennett, while committing or attempting to commit a Class C felony, to-wit: Unlawful practice of medicine (I.C. 25-22.5-8-1), that inherently poses a risk of serious bodily injury, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Indiana.

Instruction No. 5

In Count II, State vs. Harry W. Graham, the information reads as follows:

Richard McCord swears he is informed and believes that Harry A. Graham, on or about September 11,1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully and recklessly kill another human being, to-wit: Sybil A. Bennett, by administering to her purported medical treatment that was infact not administered under the supervision of or by a licensed physician and which was administered with a plain, consious, and unjustifiable disregard of the harm that might result from such treatment, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

Instruction No. 6

In Count III, State of Indiana vs. Harry W. Graham, the Information, omitting formal parts, reads as follows:

Richard McCord swears he is informed and believes that Harry W. Graham, at diverse times between June 2, 1983, and August 31, 1983, a (t) and in the County of Delaware, State of Indiana, did then and there unlawfully, knowingly practice medicine to-wit: penetrated and/or caused to be penetrated the skin and body orifices of a human being, to-wit: Sybil A. Bennett, by administering or causing to be administ(er) injections of Laetrile, colonics, pomentations and enemas of various substances to said Sybil A. Bennett, without having been licensed to practice medicine by the State of Indiana, or by any other state any other legal entity recognized in Indiana, as having authority to license

Instruction No. 6 (Cont.)

persons to practice medicine, contrary to the form of the Statute in such cases made and provided against the peace and dignity of the State of Indiana.

Instruction No. 7

This is a criminal case brought against the defendant, Ellen Gra(ham) by the State of Indiana. The case was commenced by the filing of an Information, as to count I, filed by the Prosecuting Attorney on the 17th day of October, 1983. That Information, omitting formal parts, reads as follows:

Richard McCord swears he is informed and believes that Ellen Graham, on or about September 11, 1983, at and in the County of Dela(ware) State of Indiana, did then and there unlawfully, kill another human being, to-wit: Sybil A. Bennett, while committing or attempting to commit a Class C felony, to-wit: Unlawful practice of medicine (I.C. 25-22.5-8-1), that inherently poses a risk of serious bodily injury, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

Instruction No. 8

In Count II, State of Indiana vs. Ellen Graham, the Information, omitting formal parts, reads as follows:

Richard McCord swears he is informed and believes that Ellen Graham, on or about September 11, 1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully and reckle(ssly) kill another human being, to-wit: Sybil A. Bennett, by administering to her purported medical treatment that was in fact not administered under the supervision of or by a licensed physician and which was administered with a plain, conscious, and unjustifiable disregard o(f) the harm that might result from such treatment, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

Instruction No. 9

In Count III, State of Indiana vs. Ellen Graham, the Information, omitting formal parts, reads as follows:

Richard McCord swears he is informed and believes that Ellen Graham, at diverse times between June 2, 1983 and August 31, 1983, a(t) and in the County of Delaware, State of Indiana, did then and there unlawfully, knowingly practice medicine to-wit: penetrated and/or caused to be penetrated the skin and body orifaces of a human being, to-wit: Sybil A. Bennett, by administering or causing to be administered injections of Laetrile, colonics, pomentations and enemas of various substances to said Sybil A. Bennett, without having been licensed to practice medicine by the State of Indiana, or by any oth(er) state or any other legal entity recognized in Indiana, as having authority to license

Instructions No. 9 (cont)

Persons to practice medicine, contrary to the form of the Statute in cases made and provided and against the peace and dignity of the State of Indiana.

Instruction No. 10

To this affidavit, the defendant has entered a plea of not guilty, and under the issues thus formed the burden is upon the State of Indiana to prove all the material allegations of the affidavit beyond reasonable doubt before the State would be entitled to a conviction of the defendant.

Instruction No. 11

This is a statute in Indiana which defines Involuntary Manslaughter as follows:

35-42-1-4

A person who kills another human being while committing or attempting to commit: a Class C Felony or a Class D Felony that inherent(ly) poses a risk of serious bodily injury commits Involuntary Manslaughter a Class C Felony.

To convict a defendant, the State must have proved each of the following elements bryond a reasonable doubt:

The defendant

1. Killed
2. Another human being
3. While committing or attempting to commit:
   a Class C or Class D Felony that inherently poses a risk of serious bodily injury.

Instruction No. 12

The term "serious bodily injury: is defined by law as meaning bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ.

Instruction No. 13

There is a Statute in Indiana which defines Reckless Homicide as follows: I.C. 35-42-1-5.

A person who recklessly kills another human being comits reckless homicide, a Class C Felony.

To convict a defendant, the State must have proved each of the following elements beyond a reasonable doubt:

The defendant:

1. Recklessly
2. Killed
3. Another human being;

Instruction No. 14

Culpability is defined by statute as follows:

A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

Instruction No. 15

There is a Statute in Indiana, which defines Unlawful Practice as follows:
IC 25-22.5-8-1

It is unlawful for any person to practice medicine or osteopathic medicine in this state without holding a license or permit to do so, as provided in this article.

A person who violates this article by unlawfully practicing medicine or osteopathic medicine commits a class C felony.

Practice of medicine or osteopathic medicine means the performing of any kind of surgical operation upon a human being, including tattooing, or the penetration of the skin or body orifice by any means, for the intended palliation, relief, cure or prevention of any physical, mental, functional ailment or defect of any person.

SEE STATUTE [sic]

Instruction No. 16

CHAPTER 1

Definitions and Exclusions

25-22.5-i-i.1. Definitions [effective July 1, 1982]. - As used in this article, unless the context clearly indicates otherwise:

(a) "Practice of medicine or osteopathic medicine" means any one (1) or a combination of the following:

(1) Holding oneself out to the public as being engaged in the diagnosis, treatment, correction or prevention of any disease, ailment , defect, injury, infirmity, deformity, pain or other condition of human beings, or the suggestion, recommendation or prescription or administration of any form of treatment, without limitation, or the performing of any kind of surgical operation upon a human being, including tattooing, or the penetration of the skin or body oriface by any means, for the intended pallation, relief, cure or prevention of any physical, mental or functional ailment

Instruction No. 16 (Cont.)

or defect of any person.

(2) The maintainance of an office or place of business for the reception, examination or treatment of persons suffering from disease, ailment, defect, injury, infirmity, pain or other conditions of body or mind; or [paragraph (3) excluded]

(b) "Board" means the medical licensing board of Indiana.

(c) "Diagnose or diagnosis" means to examine a patient, parts of a patient's body, substances taken or removed from a patient's body, or materials produced by a patient's body to determine the source or nature of a disease or other physical or mental condition, or to hold oneself out or represent that a person is [a] physician and is so examining a patient. It is not necessary that the examination be made in the presence of the patient: it may be made on information supplied either directly

Instruction No. 16 (Cont.)

or indirectly by the patient.

(d) "Drug or medicine" means any medicine, compound or chemical or biological preparation intended for internal or external use of man, and all substances intended to be used for the diagnosis, cure, mitigation or prevention of disease or abnormalities of man, which are recognized in the latest editions published of the United States pharmacopoeia or national formulary, or otherwise established as a drug or medicine.

(e) "License" means any individual holding a valid unlimited license issued by the board under this article.

(f) "Prescribe or prescription" means to direct, order or designate the use of or manner of using, a drug or medicine or treatment, by spoken or written words or other means.

(g) "Physician" means any person who

Instruction No. 16 (Cont.)

holds the degree of doctor of medicine or doctor of osteopathy or its equivalent and who holds a valid unlimited license to practice medicine or osteopathic medicine in the state of Indiana.

(h) "Medical school" means a nationally accredited college of medicine or of osteopathic medicine approved by the board.

(h) "Physician's assistant" means an employee of a physician who is a graduate of a physician's assistant training program approved by the board and who has successfully completed the national examination administered by the national commission on the certification of physician's assistants and who has registered with the board.

(j) "Service bureau" means the health professions service bureau under IC 25-1-5 (25-1-5-1 - 25-1-5-7), (IC 25-5-1-1.1. as added by Acts 1978, P.L. 8 § 13; 1981. P.L. 222. § 151.1)

COURT'S PROPOSED FINAL INSTRUCTION NO. 17

I.C. 16-8-8-1

A hospital or other health care facility may not interfere with a physician-patient relationship by restricting or forbidding the use of amygdalin (laetrile) as an adjunct to recognized, customary or accepted modes of therapy in the treatment of any malignancy, disease, illness or physical condition when it is prescribed or administered by a physician holding an unlimited license for the practice of medicine in the state of Indiana and the patient has signed the "written information request" therefore as set forth in section 5 (16-8-8-5) of this chapter. (IC 16-8-8-1) as added by Acts 1977, P.L.186 §1)

I.C. 16-8-8-2

A physician may not be subject to disciplinary action by the medical licensing board of Indiana for prescribing or administering amygdalin (laetrile) to a

Instruction No. 17 (cont.)

patient under his care as an adjunct to recognized, customary or accepted modes of therapy in the treatment of any malignacy, disease, illness or physical condition, if and when the patient has signed the "written informed request" therefore as set forth in section 5 (16-8-8-5) of this chapter. (IC 16-8-8-2, as added by Acts 1977,P.L.186 §1).

I.C. 16-8-8-3

A physician may prescribe or administer amygdalin (laetrile) in lieu of or in addition to customary or accepted mode of therapy in the treatment of any malignancy, disease, illness or physical condition of a patient who has signed the "written informed request" as set forth in section 5 (16-8-8-5) of this chapter. (IC16-8-8-3, as added by Acts (page 2) 1977,P.L.186,§1)

Instruction No. 17 (Cont.)

I.C. 16-8-8-4

Nothing in this chapter shall be construed as constituting an endorsement of amygdalin (laetrile) for the treatment of any malignancy, disease, illness or physical condition, and nothing in this chapter shall be construed as preventing physician for [from] prescribing amygdalin (laetrile) as a dietary supplement to a patient not suffering from any known malignancy, disease, illness or physical condition upon execution of said "written informed request" or physical conditions upon execution of said "written informed request" therefor. (IC 16-8-8-4, as added by Acts 1977, P.L.186 §1)

16-8-8-5

The "written informed request" referred to in this chapter shall be on a form prepared by, and obtained from the state board of medical registration and exam-

Instruction No. 17 (Cont.)

ination and shall be in substance as follows:

WRITTEN INFORMED REQUEST
FOR PRESCRIPTION OF AMYGDALIN
(LAETRILE) FOR MEDICAL TREATMENT

Patients name: _____

Address_____

Age_____Sex_____

Name and address of prescribing physician:

_____

Malignancy, disease, illness or physical condition, diagnosed for medical treatment by amygdaline (laetrile) or its use as a dietary supplement:

_____

_____

My physician has explained to me:

(a) That the manufacture and distribution of amygdalin (laetrile) has been banned by the Federal Food and Drug Administration.

(b) That neither the American Cancer Society, the American Medical Association, nor the Indiana State Medical Association

recommend use of amygdalin (laetrile) in the treatment of any malignancy, disease, illness or physical condition.

(c) That there are alternative recognized treatments for (begin page 3) the malignancy, disease or physical condition from which I suffer which he has offered to provide me including: (here describe)

That norwithstanding the foregoing, I hereby request prescription and use of amygdalin (laetrile) (a) in the medical treatment of the malignancy, disease, illness or physical condition from which I suffer ( ), or (b) as a dietary supplement ( ) (check a or b)

_____
Patient or person signing for patient

ATTEST:

_____
Prescribing physician

A copy of such "written informed request" shall be forwarded forthwith after execution thereof to the state board of

medical registration and examination for appropriate filing. (IC 16-8-8-5), as added by Acts 1977, P.L. 186 §1)

16-8-8-6

Amygdalin (laetrile) is not a drug or a controlled substance under Indiana statutes governing the use, manufacture, or distribution of drugs and controlled substances within the state. A physician may prescribe amygdaline (laetrile) pursuant to this chapter as a treatment which can be prescribed pursuant to I.C. 25-22.5-1-1(f) repealed. The state board of health and the Indiana pharmacy board may regulate the manufacture, dis-

Instruction No. 17 (Cont.)

tribution and sale of amygdalin (laetrile) for use within the state only to insure that the substance is not adulterated or misbranded within the meaning of IC-1-28-3. The state board of health may make no rule or regulation which would prohibit the use of amygdalin (laetrile) in any hospital, ambulatory outpatient surgical center or health care facility licensed by it. The Indiana pharmacy board may make no rule or regulation which would prohibit the manufacture, distribution of sale of amygdalin (laetrile) by any person or in any place licensed by it.

(IC 16-8-8-6, as added by Acts 1977, P.L.186§1).

16-8-8-7

-(a) Nothing in this chapter requires any physician, any (begin page 4) pharmacist, any pharmacy, any manufacturer or distributor to manufacture, sell or distribute

Instruction No. 17 (Cont.)

Amygdalin (laetrile), and nothing requires any physician to prescribe amygdalin (laetrile) for any patient.

(b) If the federal government indicates that it will withdraw all federal funds from a health care facility for allowing amygdalin (laetrile) to be used within the facility, and if providing or allowing its use within facility would jeopardize the receipt of federal funds for reimbursement for medicare or medicade for all persons within the facility, or any construction funds provided by the federal government under the Hill-Burton hospital construction program (42 U.S.C.§ 291 et esq.) or under Title XVI (42 U.S.C. §300o-300t) of the Public Health Services Act, the hospital or other health care facility may, notwithstanding the provisions of section 1 (16-8-8-1) of this chapter, prohibit the use of amygdalin

Instructions 17 (Cont.)

(laetrile) within its facility.

(IC16-8-8-7, as added by Acts 1977, P.L.

186§1).

Instruction No. 18

Both defendants raised the defense that they were not engaged in the unlawful or unauthorized practice of medicine because they were members of a church practicing its religious tennents. At all times in question there was in full force and effect a statute of the State of Indiana which provided in pertinent part as follows:

"I.C. 22.5-1-2. This article insofar as it relates to the unlawful or unauthorized practice of medicine or osteopathic medicine shall not apply:

". . .

(f) To any member of any church practicing its religious tennents so long as he does not make medical diagnosis, prescribe or administer drugs or medicines, perform surgical or physical operations, assume the tital of, or hold himself out to be a physician."

Instruction No. 18 (Cont.)

If you find that the state has not proven beyond a reasonable doubt that defendants, or either of them, were not practicing their church's religious tennants in their minestrations to Sybil Bennett or that they performed surgical or physical operations you should find the defendants, or either of them not guilty.

Instruction No. 19

You are instructed that it is the inalienable right of a person to decide to obtain or reject medical treatment.

Instruction 20

In order for you to find the defendants or either of them guilty of the crime of involuntary manslaughter or reckless homicide you must first find that the state has proved beyond a reasonable doubt that the defendants, or either of them, were engaged in the unlawful practice of medicine.

Instruction No. 21

In a prosecution for Involuntary Manslaughter or Reckless Homicide, the State must prove to you beyond a reasonable doubt, that the defendants or either of them; did an act or acts, which caused or contributed mediately or immediately to her death.

In other words, before you can find the defendants, or either of them, guilty of Involuntary Manslaughter or Reckless Homicide, you must find the act or acts of the defendant or defendants was a direct and proximate cause of the death of Sybil Bennett.

Instruction No. 22

Aiding, inducing or causing an offense is defined by Statute as follows:

A person who knowingly or intentionally aids, induces or causes another person to commit an offense commits that offense, even if the other person:

has not been prosecuted;
or has not been convicted of the offense;
or has been acquitted of the offense.

STATE'S PROPOSED INSTRUCTION NO. 23

Consent to treatment is not a good defense to a homicide prosecution arising out of the care or treatment of a sick person, if you find that treatment was in fact given.

If the jury finds, beyond a reasonable doubt, that the defendants, or either of them, was reckless or did seriously and unreasonably endanger life according to common experience, such acts cannot be justified by the deceased's concent. A prosecution for homicide is for the public benifit and willingness of the patient cannot remove the offense against the public. State v. Kansunky (1938) 197 Wash. 87, 84 P.2d 390

STATE'S PROPOSED FINAL INSTRUCTION NO. 24

If you find a person undertakes to treat those who search for health and who are, because of their plight, more or less susceptible of following the advice of anyone who claims the knowledge and means to heal, cannot escape the consequences of his gross ignorance of accepted and established remedies and methods for the treatment of diseases from which he knows his patient suffers, and if wrongful acts, positive or negative, reach a degree of recklessness, he will be answerable to the State .

State v. Heines, 144 Fla. 272, 197 So. 787

STATE'S PROPOSED FINAL INSTRUCTION NO. 25

One can be held criminally liable for his failure to act in at least four situations:

first; where a statute imposes a duty to care for another; second, where one stands in a certain status relationship with another; third, where one has assumed a contractural duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Jones v. United States, (U.S. Ct. of Appeals, Dist. of Columbia, 1963; 308 F.2d 307, 310.

STATE'S PROPOSED FINAL INSTRUCTIONS NO. 26

Where an accused, knowing that another is in need of proper medical attention to save the life of the other and, with reckless and wanton cupidity, induces the other to forego such treatment and submit to treatment by the accused, by knowingly making false representations that his methods would cure the other, with the result that the other's life is shortened, the law rejects the contention that such conduct did not proximately cause the death, if you find from the evidence that proper care would have extended the life of the deceased.

Homicide is always the shortening of human life. ~~If you find that a defendant's culpabile act has significantly decreased the span of a human life, beyond a reasonable doubt, the law will not hear him say that his victim would thereafter have died in any event.~~ People v. Phillips, (1966) 64 Cal.2d 574, 414 p.2d 353

COURT'S INSTRUCTION NO. 27

When I use the words "proximate cause" I mean the cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without the result would not have occured.

Given X

signed
Jerrald A. Crowell

Instruction No. 28

In this case the defendant is presumed innocent until proven guilty beyond a reasonable doubt, and this presumption prevails until the conclusion of the trial, and you should weigh the evidence in the light of this presumption of innocense and it should be your endeavor to reconcile all the evidence with this presumption of innocense if you can, but if this cannot be done, and the evidence so strongly tends to establish the guilt of the defendant as to remove all reasonable doubt of the guilt of such defendant, from the mind of each juror, then it is the duty of the jury to convict.

Instruction No. 29

A "reasonable doubt" is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.

If, after considering all the evidence, you have reached such a firm belief in the guilt of the defendant that you would feel safe to act upon conviction, without hesitation, in a matter of highest concern and importance to you, when you are not required to act at all, then you will have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.

The rule of the law which requires proof of guilty beyond a reasonable doubt applies to each juror individually. Each of you must refuse to vote for conviction unless you are convinced beyond a reason-

Instruction No. 29 (Cont.)

able doubt of the defendant's guilt. Your verdict must be unanimous.

Instruction No. 30

Motive is that which prompts a person to act. The State is not required to prove a motive for the commission of the crime charged.

Instruction No. 31

Generally a witness may not express an opinion. However, one who follows a profession or special line of work is permitted to express his opinion because of his education, knowledge and experience. The purpose of such testimony is to assist you in arriving at a just verdict.

You should judge the testimony of the expert witness in the same manner as you judge the testimony of any other witness. In determining its weight, you may also take into consideration his skill, experience, knowledge, veracity, familiarity with the facts of this case, and the general rules for determining the credibility of witnesses.

Instruction No. 32

When the prosecuting attorney and the attorney for the defendant stipulate or agree as to the existance of a certain fact, you should accept such stipulated or agreed fact as conclusively proved.

Instruction No. 33

In clothing those charged with crime with presumption of innocense, the law does not contemplate that thereby the guilty should be shielded from merited punishment. Its object is to protect the innocent, so far as human agencies can, from the effects of unjust verdicts. The effect of this presumption is to withhold punishment from one charged with crime until all the facts necessary to constitute the offense charged have been proved to that degree of certainty fixed by law as beyond reasonable doubt.

Instruction No. 34

In instructing you that the burden of proof is on the State to prove the defendant guilty beyond a reasonable doubt, the Court does not mean and it is not the law that the State is bound to prove every piece of evidence in the case beyond a reasonable doubt. The final ultimate and essential facts which the State must prove beyond a reasonable doubt are those stated in the indictment which constitute the crime with which the defendant is charged or which constitute one of the crimes included in the crime of [NOT STATED]

The matters of evidence introduced for the purpose of proving these essential facts may be of various kinds and come from various sources, and if you would take these apart and consider each singly by itself, there might be some reasonable doubt as to some one or more of these various places of evidence, and yet the

Instruction No. 34 (Cont.)

combined effect of all this evidence may constitute to your minds proof beyond a reasonable doubt of the ultimate essential facts, and if the combined effect of all the various facts and circumstances in evidence is such that it produces in your minds a conviction of the truth of the ultimate essential facts charged against the defendant, beyond a reasonable doubt, then the requirement of the law in that respect will have been satisfied.

Instruction No. 35

Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts.

It is not necessary that facts be proven by direct evidence. both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

Instruction No. 36

You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe, the manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all the evidence in the case.

You should attempt to fit the evidence to the presumption that the defendant is innocent and the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony

Instruction No. 36 (Cont.)

You must determine which of the witnesses you will believe and which of them you will disbelieve.

In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. The number of witnesses who testify to a particular fact, or the quantity of evidence on a particular point need not control your determination of the truth. You should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

Instruction No. 37

In considering this case you will no doubt meet with conflicts in the evidence. It is a matter of common knowledge that witnesses to an event rarely see or hear all the circumstances alike. Whenever you meet with such conflicts, reconcile them, if you can, on the assumption that each witness has testified truthfully. If you cannot so reconcile the conflicts, it is for you to determine what you will believe and what you will not believe.

Instruction No. 38

These instructions do not contain any information concerning the penalties that could be imposed upon a conviction. The judge is solely responsible for assessing the penalty within a broad range of possibilities. The law has been so written that you may make your decision without being influenced by the apparent severity or leniency of the sentence.

Instruction No. 39

The unsworn statements or comments of counsel on either side of the case should not be considered as evidence in the case. It is your duty to determine the facts from the testimony and evidence admitted by the Court and given in your presence, and you should disregard any and all information that you may derive from any other source.

Defendant's proposed

Instruction No.

COURT'S INSTRUCTION NO. 40

You should reconcile the evidence or lack of evidence in this case upon the theory of the innocence of the defendant, if it can reasonably be done.

GIVEN _____

Miller v. State, 236 N.E.2d 173 (1968)

Jerrald A. Crowell

Instruction No. 41

The law contemplates the concurrance of the minds of all twelve members of the jury in reaching a verdict. Every juror should weigh for himself or herself the evidence in this case and make up his or her own mind as to the guilt or innocence of the defendant on trial. Every juror should consult freely, fairly and fully with his fellow jurors on the facts at issue and the law involved in this cause. No juror should through indifference or weakness yield his or her own honest conviction and deliberate judgement on the question of the guilt or innocense of the defendant, and on the other hand no juror should allow mere pride of personal opinion or other motive to prevent him from consultation with his fellow jurors in a good faith effort to reach a just verdict. If, after considering all the evidence and consulting with the other jurors as advis-

Instruction No. 41 (Cont.)

ed in this instruction, any juror still has a reasonable doubt, such juror is to refrain from voting for a conviction.

Instruction No. 42

I have prepared some forms of verdict, any one of which you may use, if you desire, or you may prepare your own verdict, in the event you agree.

Instruction No. 43

You will have with you in your deliberations the affidavit in this case, but you are instructed that this affidavir is not to be considered by you for any purpose except to disclose to you the nature of the charge against this defendant. The affidavit is not to be considered as any evidence whatever of guilt of the defendant. The Court does not by anything contained in these instructions nor by anything which as occurred during this trial, assume or intimate that any fact has been or has not been proven, but the question of proof as to all facts in this case is for you to determine.

You should not consider for any purpose any evidence offered and which has been ruled by the Court to be improper or inadmissable or any evidence which has been stricken out. You should not consider any statement of counsel on either side as

Instruction No. 43 (Cont.)

any evidence or any material fact in issue.

You should not be influenced or prejudiced in any degree by your acquaintance or lack of acquaintance with either party or with the attorneys in the case. You should be governed entirely by the evidence as given you by the witnesses, and the law as you find it to be, and render your verdict accordingly. The Court has not attempted to embody all the law of the case in any one instruction. Therefore, in construing any single instruction, you must consider it in connection with all the other instructions given you and construe them in harmony with each other.

When you retire to your jury room, you should select one of your number foreman, and when you have agreed upon a verdict, have your foreman sign such verdict and return it into Open Court. (except alternate). You may go with the Bailiff.

No._____

STATE OF INDIANA

vs.

Information for

WITNESSES

Richard McCord I.S.P.

John Starkey I.S.P.

Larry Pritchard I.S.P.

Glenn Scroggins Coroner

Jack K. Bennett

Gail Helland

Dr. Robert P. Suer

Dr. Clyde G. Botkin

FILED
CLERKS OFFICE
DELAWARE CO. INDIANA
OCT 17 1983
Scott A. Hole
CLERK

Approved by me:

Michael L. Alexander

Prosecuting Attorney within and for the
46th Judicial Circuit of the State of Indiana

No._____

STATE OF INDIANA

vs.

_____

Information for_____

_____

WITNESSES

Richard McCord I.S.P.

John Starkey I.S.P.

Larry Pritchard I.S.P.

Glenn Scroggins, Coroner

Jack Bennett

Gail Heiland

Dr. Robert P. Suer

Dr. Clyde G. Borkin

_____

Approved by me:

(signed) Michael J. Alexander

Prosecuting Attorney within and for the 46th Judicial Circuit of the State of Indiana.

Filed: Clerk's Office,

Delaware Co., Indiana

Oct. 17, 1983

Scott A. Hole, Clerk

STATE OF INDIANA COUNTY OF DELAWARE	SS:	IN THE DELAWARE COUNTY COURT SYSTEM 1983 TERM

CAUSE NO. CS 83/43

STATE OF INDIANA	INFORMATION FOR
VS.	Count II
HARRY W. GRAHAM	Reckless Homicide
	I.C. 35-42-1-5
	Class C Felony

Richard McCord swears he is informed and believes that HARRY W. GRAHAM, on or about September 11, 1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully and recklessly kill another human being, to-wit: Sybil Bennett, by administering to her purported medical treatment that was in fact not administered under the supervision of or by a licensed physician and which was administered with a plain, conscious, and unjustifiable disregard of the harm that

might result from such treatment,

contrary to

the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

(signed) Richard McCord

Subscribed and sworn to before me this 16th day of October, 1983.

(signed) M. J. Alexander
Prosecuting Attorney
46 Judicial Circuit
State of Indiana

FILED: Clerks Office
Delaware Co., Indiana

Oct. 17, 1983

Scott A. Hole, Clerk

STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE
COUNTY COURT
SYSTEM 1982 TERM
[1983]

CAUSE NO. CS 83/43

STATE OF INDIANA
VS.
HARRY W. GRAHAM

INFORMATION FOR
Count III
Unlawful Practice
I.C. 25-22.5-8-1
Class C Felony

Richard McCord swears he is informed and believes that HARRY W. GRAHAM, at divers times between June 2, 1983, and August 31, 1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully, knowingly practice medicine to-wit; penetrated and/or caused to be penetrated the skin and body orifaces of a human being, to-wit: Sybil Bennett, by administering or causing to be administered injections of Laetrile, colonics, pomentations and enemas of various substances to

said Sybil A. Bennett, without having been licensed to practice medicine by the State of Indiana, or by any other state or any other legal entity recognized in Indiana, as having authority to license persons to practice medicine,

contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

(signed) Richard McCord

Subscribed and sworn to before me this 16th day of October, 1983.

(signed) M. J. Alexander
Prosecuting Attorney
46th Judicial Circuit
State of Indiana

FILED: Clerks Office
Delaware County, Indiana
10/17/83, Scott A. Hole, Clerk.

STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE
SUPERIOR COURT NO.
CIRCUIT COURT
19___ TERM

ADJUDICATION OF PROBABLE CAUSE

Comes now the Judge of the Delaware Superior Court No. 4, State of Indiana, and having personally examined an Affidavit of Probable Cause executed for the purpose of determining whether a bench warrant(s) should be issued wherein Harry W. Graham is charged with the offenses of Involuntary Manslaughter, Count I, Reckless Homicide, Count II and Unlawful Practice, Count III in Cause No. CS-83-43 in the Delaware Superior Court No. 4 which is alleged to have been committed on the 11th day of September, 1983.

And the Court, having been duly advised therein, now finds that there is sufficient probable cause for a bench

warrant to be issued for the arrest of the said HARRY W. GRAHAM.

(Signed) Robert E. Robertson
Judge of the Delaware Superior Court No. 4

Dated this 16th day of October, 1983

STATE OF INDIANA COUNTY OF DELAWARE	SS:	IN THE DELAWARE COUNTY COURT SYSTEM 1983 TERM
STATE OF INDIANA VS. ELLEN GRAHAM		CAUSE NO. CS 83/44 INFORMATION FOR COUNT I Involuntary Manslaughter I.C. 35-42-1-4 Class C Felony

Richard McCord swears he is informed and believes that ELLEN GRAHAM on or about September 11, 1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully kill another human being, to-wit: Sybil A. Bennett, while committing or attempting to commit a Class C Felony, to-wit: Unlawful practice of medicine (I.C. 25-22.5-8-1), that inherently poses a risk of serious bodily injury,

contrary to the form of the statute

in such cases made and provided and against the peace and dignity of the State of Indiana.

(Signed) Richard McCord

Subscribed and sworn to before me this 16th day of October, 1983.

(Signed) M. J. Alexander
Prosecuting Attorney
46th Judicial Circuit
State of Indiana

FILED: Clerks Office
Delaware Co., Indiana
Oct. 17, 1983
Scott A. Hole, Clerk

STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE
COUNTY COURT
SYSTEM 1983 TERM

CAUSE NO. CS 83/44

STATE OF INDIANA
VS.
ELLEN GRAHAM

INFORMATION FOR
Count II
Reckless Homicide
I.C. 35-42-1-5
Class C Felony

Richard McCord swears he is informed and believes that ELLEN GRAHAM, on or about September 11, 1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully and recklessly kill another human being, to-wit: Sybil Bennett, by administering to her purported medical treatment that was in fact not administered under the supervision of or by a licensed physician and which was administered with a plain, oonscious, and unjustifiable disregard of the harm that

might result from such treatment, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

(Signed) Richard McCord

Subscribed and sworn to before me this 16th day of October, 1983.

(Signed) M. J. Alexander
Prosecuting Attorney
46th Judicial Circuit
State of Indiana

FILED: Clerks Office
Delaware Co., Indiana
Oct. 17, 1983
Scott A. Hole, Clerk

STATE OF INDIANA	)	IN THE DELAWARE
	) SS:	
COUNTY OF DELAWARE	)	COUNTY COURT
		SYSTEM 1983 TERM
		CAUSE NO. CS 83/44
STATE OF INDIANA		INFORMATION FOR
VS.		Count III
ELLEN GRAHAM		Unlawful Practice
		I.C. 25-22.5-8-1
		Class C Felony

Richard McCord swears he is informed and believes that ELLEN GRAHAM, at divers times between June 2, 1983, and August 31, 1983, at and in the County of Delaware, State of Indiana, did then and there unlawfully, knowingly practice medicine to-wit: penetration and/or caused to be penetrated the skin and body orifaces of a human being, to-wit: Sybil Bennett, by administering or causing to be administered injections of Laetrile, colonics, pomentations and enemas of various substances to

said Sybil A. Bennett, without having been licensed to practice medicine by the State of Indiana, or any other state or any other legal entity recognized in Indiana, as having authority to license persons to practice medicine,

contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

(Signed) Richard McCord

Subscribed and sworn to before me this 16th day of October, 1983.

(Signed) M. J. Alexander
Prosecuting Attorney
46th Judicial Circuit
State of Indiana

FILED: Clerks Office
Delaware County, Indiana
10/17/83, Scott A. Hole, Clerk.

STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE
SUPERIOR COURT NO.
CIRCUIT COURT
19__ TERM

ADJUDICATION OF PROBABLE CAUSE

Comes now the Judge of the Delaware Superior Court No. 4, State of Indiana, and having personally examined an Affidavit of Probable Cause executed for the purpose of determining whether a bench warrant(s) should be issued wherein ELLEN GRAHAM is charged with the offenses of Involuntary Manslaughter, Count I, Reckless Homicide, Count II and Unlawful Practice, Count III in Cause No. CS-83-44 in the Delaware Superior Court No. 4 which is alleged to have been committed on the 11th day of September, 1983.

And the Court, having been duly advised therein, now finds that there is sufficient probable cause for a bench

warrant to be issued for the arrest of the said ELLEN GRAHAM.

(signed) Robert E. Robertson
Judge of the Delaware Superior Court No. 4

Dated this 16 day of October, 1983.

STATE OF INDIANA)
DELAWARE COUNTY) SS: SEARCH WARRANT

In the Superior Court #3 of Delaware County, the Honorable Jim Schafer, Issuing Judge: To any police officer or Sheriff, GREETINGS:

You are hereby commanded to search for and seize the evidence and fruits of crime, to-wit:

A ledger documentating the purported medical treatment of Sybil A. Bennett, and/or any other persons who have received medical treatment. Any files concerning the treatment of Sybil A. Bennett and/or any other patients treated medically by Harry W. Graham, and/or Ellen Graham and any business records showing payments received from Sybil A. and/or Jack Bennett, or any other persons for medical treatment received from Harry W. and/or Ellen Graham, any instruments commonly used in the medical profession and/or any medicines commonly prescribed in medical treatment by physicians under the laws of the State of Indiana, including but not limited to drug laetrile (Amygdalin). And records indicating the purchase of or the shipment of or prescription of laetrile. Any and all records of "Hoosier Health House" offering cancer treatment and/or documenting treatment given under the business name of "Hoosier Health House", of any billings by "Hoosier

Health House" for any type of medical treatment.

You are hereby authorized and directed to search the following premises:

A wood frame house, with white asbestos shingles and a silver gray roof, together with a cement addition to said house. Said house having a cement entrance ramp to the front porch with pipe railing located southeast of the intersection of Co. Rd. 925 West and State Rd 28, in Delaware County, Indiana, more particularly approximately 90 feet south of St.Rd 28 and 25 feet east of 925 West. Also a cement block building with a silver gray shingled roof with the red letters "Hoosier Health House" in red letters on said roof, having an entry way on the west side of said building. Said building located approximately 50 ft South of St. Rd. 28 and 50 ft. East of 925 West. Both of said buildings occupied and controlled by Harry W.and Ellen Graham.

This warrant may be executed in the daytime or nighttime

(end of page 1 of warrant)

within a reasonable time of the issuance hereof.

This Court specifically determines that there exists probable cause to believe that the items to be seized are located at the

above described premises, the sole basis for such determination being the testimony of Dick McCord, recorded in Open Court and ordered preserved in the Court's record.

Issued this 30th day of September, 1983.

YOU ARE THEREFORE COMMANDED, IN THE NAME OF THE STATE IF INDIANA, WITH THE NECESSARY AND PROPER ASSISTANCE, IN THE DAYTIME OR IN THE NIGHTTIME TO ENTER INTO OR UPON THE PREMISES HEREIN DESCRIBED AND THERE DILIGENTLY SEARCH FOR SAID ITEMS AND BRING THE SAME OR ANY PART THEREOF FOUND ON SAID SEARCH, FORTHWITH BEFORE ME AT MY OFFICE TO BE DISPOSED OF ACCORDING TO LAW.

(Signature not legible)

Judge Pro-tem
Delaware Superior Court No. 3

ABSTRACT OF JUDGEMENT, Indiana Department of Corrections

STATE OF INDIANA VS. HARRY GRAHAM

Cause No. CS-83/43, Superior Court I

Sentencing Date: April 26, 1984

Presiding Judge, Robert L. Barnett

Prosecutor, Michael J. Alexander

Defense Attorney, Jerrald A. Crowell

Part 1

The defendant was found Guilty of the following crimes under the above-referenced cause:

Count	Crime	Class	Fel.	Statutory Citation
I	Involuntary Manslaughter	C	X	35-42-1-5
II	Reckless Homicide	C	X	35-42-1-4
III	Unlawful Practice of Medicine	C	X	25-22.5-8-5

Part 2

As a result of the above convictions, the Court has sentenced the defendant to the Department of Correction as follows:

Count	Sentence Years/days	...with count or cause numbers
I	Judgement not entered on Count I	
II	3 years	
III	3 years	To run concurrent with Count II

Part 3

Judge's Recommendations:

Number of days confined prior to sentencing: 39.

Additional comments: Due to a denial by the Supreme Court of Indiana on defendant's Petition for Transfer, Appeal Bond in this cause, granted 04/26/84, is now revoked and the defendant is ordered this date to begin serving previously imposed sentences.

Part 4

(Signed) Robert Barnett - Judge- 03/11/86

Part 5

Affidavit of Clerk

State of Indiana)
) SS:
County of Delaware)

I, Scott A. Hole, Clerk of Delaware County State of Indiana, do hereby certify that the foregoing is a true and complete abstract of cause, on the date first shown on record in my office. As testimony of these facts, I sign my name and affix the seal of the Superior Court I of Delaware County, at my office in the City of Muncie, this 11th day of March, 1986.

(Signed) Scott A. Hole

THIS ABSTRACT OF JUDGEMENT IS STAMPED "RECEIVED, MARCH 11, 1986, DELAWARE COUNTY SHERIFF, Gary Carmichael".

ABSTRACT OF JUDGEMENT, Indiana Department of Correction

STATE OF INDIANA VS. ELLEN GRAHAM

Cause No. CS-83-44 Superior Court I

Sentencing Date: April 26, 1984

Presiding Judge, Robert L. Barnett

Prosecutor, Michael J. Alexander

Defense Attorney, Jerrald A. Crowell

Part 1

The defendant was found Guilty of the following crimes under the above-referenced cause:

Count	Crime	Class	Fel.	Statutory Citation
I	Involuntary Manslaughter	C	X	35-42-1-5
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As a result of the above convictions, the Court has sentenced the defendant to the Department of Correction as follows:

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Judge's Recommendations:

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(Signed)Robert Barnett - Judge - 03/11/86

Part 5

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State of Indiana)
County of Delaware) SS:

I, Scott A. Hole, Clerk of Delaware County State of Indiana, do hereby certify that the foregoing is a true and complete abstract of cause, on the date first shown on record in my office. As testimony of these facts, I sign my name and affix the seal of the Superior Court I of Delaware County, at my office in the City of Muncie, this 11th day of March, 1986.

(Signed) Scott A. Hole

THIS ABSTRACT OF JUDGEMENT IS STAMPED "RECEIVED, MARCH 11, 1986, DELAWARE COUNTY SHERIFF, Gary Carmichael".

WHO KILLED SYBIL BENNETT ?

Here are a few of the twenty-six (26) different DRUGS and MEDICARIONS more or less, that were given to Sybil Bennett during her eighteen (18) says in the hospital. These are taken from her hospital medical records recieved by the petitioners through discivery.

Sybil Bennett had a breathing problem from the time she was in her teens. She slept propped up on pillows most of her married life.

Sybil Bennett was given the following drugs as described:

Heparin (sodium) "it can cause extensive bleeding." PDR 1109,1110.

Ativan - "is a sedative. It depresses the central nervous system. It can cause listlessness, confusion, and hallucinations. Extreme care is needed when given to very ill

patients with poor pulmonary reserve." P.D.R. 2041, 2042.

Lasix - is a potent diuretic. It can cause circulatory collapse and liver damage. P.D.R. 973, 974.

Morphine (sulfate) - can cause respiratory arrest. (R) 203. - Dr. Suer.

Nepsin - can cause nerve poison; also, paralysis of breathing. It has the potential of causing kidney poisoning and should NOT BE USED WITH LASIX. (R, 193, 199).

same as Tobramycin

SoluMedrol - is an anti-inflammatory steroid. It can cause psycic derangement, mood swings and severe depression. P.D.R. 1968, 1969.

Valium - has calming effect, Do NOT MIX OR DILUTE VALIUM WITH OTHER SOLUTIONS OR DRUGS. May cause cardiac arrest, confusion and depression, P.D.R. 1623, 1624.

Who Killed Sybil Bennett (Cont.)

Sybil Bennett's death certificate said that the cause of death was cancer. Dr. Suer testified in Court that the immediate cause was "Respiratory failure".

Dr. Suer called Harry Graham soon after Sybil Bennett arrived at the hospital concerning her "Unusual heart rythms".

Please note the warnings from the P.D.R. (Physician's Desk Reference) for these drugs. These warnings are from the drug manufacturers.

Please SEE page 202 and EXHIBIT "D".

Date: 1983		24 Aug	25	26	27	28	29	30	31	1 Sept	2	3	4	5	6	7	8	9	10	11
Hospital Day		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
DRUG DOSAGE	HOW GIVEN																			
Ativan 1 mg	IV		2x																	
Heparin 1000u in 500 ~~5000u~~ ~~1cc~~	IV						1x	1x			2x		1-200cc only							
	under skin		1x	2x	2x	2x	2x	2x	2x	1x	1x	2x	2x	2x	2x	2x	2x	2x		
Morphine Sulfate 2 mg	IV	2x	1x	4x	5x															1x
4 mg				4x	5x	2x	4x	6x							2x					
5 mg						4x	6x		7x	3x										
10 mg																				
Solu-Medral 100 mg	IV	1x	1x	4x	4x	4x	4x	4x	4x	4x	4x	4x	4x	4x	4x	4x	4x	4x	4x	2x
250 mg			3x																	
Valium 5 mg	IV		1x	1x	1x				1x	1x							2x			
10 mg			1x	1x																
Lasix 20 mg	IV	1x	2x		1x	2x														1x
40 mg		1x	1x		1x	2x	2x	1x												
100 mg																				
Nepsin 70 mg or Tobra-mycin 100 mg	IV	1x	3x	3x	3x	3x	3x	3x	2x		2x 1x	3x	3x	3x	3x	3x	3x	3x	2x	
Tylenol 10 gr. R Supp				1x		1x	1x	1x	1x	3x	6x	5x	2x				1x	2x	2x	3x
Aspirin 10 gr. R Supp												3x	3x				2x	1x	2x	3x

SYBIL BENNETT WAS OF SOUND MIND

Affidavit: To Whom It May Concern:

I, Donna Justinen, registered nurse, do affirm the following:

That I, being of a sound mind and a reasponsible citizen, do affirm that I went to high school with Sybil Bennett, 1952-4, and visited with her in August 1983.

Sybil Bennett was of a sound mind and freely discussed her situation with me. She had willingly chosen an alternate form of therapy for her health problem. She stated she was under a doctor's guidance to ascertain her condition and therapy.

She discussed her choice of and faith in her helpers (Harry and Ellen Graham) with me, Donna Justinen, an assistant Professor of Nursing at Anderson College in 1983.

I ascertained that she was aware of the

standard treatment of cancer such as, chemotherapy, radiation and etc., but she had chosen an alternate approach which included, nutrition, body cleansing etc.

(signed) Donna Justinen
Donna Justinen R.N., B.S., M.S.

STATE OF INDIANA,COUNTY OF HAMILTON) SS:

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 22nd day of September, 1986.

(signed) Tammy Louise Leeman
Notary Public

(signed) Tammy Louise Leeman
Printed

My commission Expires: August 19, 1989

County of Residence: Hamilton County

Footnote: Donna J. Justinen is an Assistant Professor of Nursing at Anderson College, Indiana, and holds both Bachelor and Master of Science degrees. Home address: 1330 Twilight Dr., Noblesville, IN 46060

(3)

86-536

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR
CLERK

IN THE

Supreme Court of the United States

Cause No. A - 812

HARRY GRAHAM AND ELLEN GRAHAM

Petitioners

v.

STATE OF INDIANA

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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32pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Issues 2

Statement of the Case 3

Summary of the Argument 8

Argument:

I. THE STATUTE DEFINING UNLAWFUL PRACTICE OF MEDICINE IS NOT UNCONSTITUTIONAL 9

II. THE SEARCH WARRANT IN THIS CASE WAS NOT IMPROPERLY OBTAINED ... 14

III. & IV. IT WAS NOT IMPROPER TO HOLD THAT AN APPELLATE CONTENTION CONCERNING THE INTRODUCTION OF CERTAIN EVIDENCE WAS WAIVED BY USE OF A DIFFERENT BASIS FOR OBJECTION AT APPEAL THAN THE BASIS MAINTAINED AT TRIAL 15

V. NO BASIS FOR RELIEF IS SHOWN ON THE BASIS OF THE INSTRUCTIONS GIVEN BY THE TRIAL COURT 19

VI. THERE IS NO BASIS FOR RELIEF SHOWN IN THE DENIAL OF A TENDERED INSTRUCTION 20

VII. & VIII. THERE IS NO ISSUE OF VIOLATION OF FIRST AMENDMENT RELIGIOUS RIGHTS 21

IX. THERE WAS NO DOUBLE JEOPARDY VIOLATION 22

X. THERE IS NO ERROR IN FAILING TO PERFORM AN AUTOPSY 24

Conclusion 27

TABLE OF AUTHORITIES

CASES	Pages
Armstrong v. State, Ind., 429 N.E.2d 647 (1984)	18
Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 337 (1974)	10, 11
Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)	23
Blockburger v. United States, 284 U.S. 299, 52 S.Ct., 75 L.Ed. 306 (1932)	23
Dean v. State ex rel Board of Medical Registration and Examination, 233 Ind. 25, 116 N.E.2d 503 (1954)	12
Elmore v. State, Ind., 382 N.E.2d 893 (1978).....	23
Grayned v. City of Rockford, 408 U.S. 104, 97 S.Ct. 2294, 33 L.Ed.2d 222 (1972)	10
Harrington v. State, Ind. App., 413 N.E.2d 622, *trans. denied* (1980)	21
Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed 2d 527 (1983).....	14, 17, 19, 20, 22, 24
McDonald v. State, 264 Ind. 477, 346 N.E.2d 569 (1975)	20
North Carolina v. Pierce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969)	23
Powell v. State, Ind., 437 N.E.2d 969 (1982)	19
Salrin v. State, Ind. App., 419 N.E.2d 1351 (1981) ..	24
Slusher v. State, Ind. App., 437 N.E.2d 97 (1982) ..	24, 25
State ex rel Medical Licensing Board v. Brady, Ind. App., 492 N.E.2d 34 (1986)	11
United States v. Stump, 735 F.2d 273 *cert. denied*, ___ U.S. ___, 105 S.Ct. 203, 83 L.Ed.2d 134 (1984).	18
Woods v. State, Ind., 471 N.E.2d 691 (1984)	18

Statutes:

28 U.S.C. §1257 17
Indiana Code 25-22.5-1-1.1(a) 9
Indiana Code 25-22.5-1-1.1(c) 11
Indiana Code 25-22.5-1-1.1(f) 11
Indiana Code 22-22.5-8-1 ..... 3, 9
Indiana Code 35-42-1-4 3
Indiana Code 35-42-1-5 3
Ind. Stat. Ann 63-1311, Burns 1951 12

Other Authorities:

Opinion of the Attorney General of Indiana 1899-1900, p. 107 12

IN THE

Supreme Court of the United States

Cause No. A - 812

HARRY GRAHAM AND ELLEN GRAHAM

Petitioners

v.

STATE OF INDIANA

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari to the Supreme Court of Indiana, thereby refusing to review the decision entered by that court in Cause No. 2-984 A 274.

OPINION BELOW

The denial of Petition for Transfer may be found at Page 1 of Petitioners' "Appendix to Writ of Certiorari to the United States Supreme Court." That denial had the effect of letting stand the earlier decision and opinion of the Court of Appeals of Indiana which is reported at 480 N.E.2d 981, and may be found at page 8 of Petitioners' Appendix.

STATEMENT OF THE ISSUES

In the manner frequently encountered in *pro se* pleadings, the issues involved in this Petition are sometimes poorly or vaguely defined. Upon analysis of the written argument, it is sometimes seen that in argument Petitioners are actually developing a different issue or legal principle than would be suggested by their list of "Questions Presented" or their discussion headings.

The State would therefore respectfully propose to take the liberty of restating the issues presented in a manner which as fairly and concisely as possible defines the issues raised:

(pp. 20-27 of Petition)

I. Whether Indiana's medical licensing statute is unconstitutionally vague.

II. (pp. 27-29) Whether there was insufficient probable cause to issue a search warrant for Petitioners' business premises.

III. Whether the Indiana appellate courts improperly decided that an issue presented on appeal had been waived due to presentation of a basis for objection at the appellate level that was different from that raised at trial.

IV. Whether certain evidence was improperly admitted, against a contention that it was irrelevant or prejudicial.

V. Whether certain instructions were erroneously given against objections that they incorrectly stated Indiana law.

VI. Whether it was error to refuse a request for an instruction concerning the nurses' licensing statute.

VII. Whether the Indiana medical licensing statute unduly restricts the constitutionally-guaranteed right to free exercise of religion.

VIII. Whether the judgment in this case operated as an unconstitutional bar on a right of Sybil Bennett's to pursue her desired form of health care.

IX. Whether trial and verdicts on both the manslaughter and homicide counts constituted double jeopardy.

X. Whether there was error inherent in the failure to perform an autopsy on Sybil Bennett.

STATEMENT OF THE CASE

Petitioners Harry and Ellen Graham are husband and wife. They were both charged with involuntary manslaughter (Indiana Code 35-42-1-4), reckless homicide (Indiana Code 35-42-1-5), and unlawful practice of medicine (Indiana Code 25-22.5-8-1). Guilty verdicts were returned on all counts. The trial court entered judgments of conviction on the counts of reckless homicide and unlawful practice of medicine, "merging" the involuntary manslaughter verdict with that of reckless homicide.

The victim in this case was Sybil Bennett. She and Mr. and Mrs. Graham were all members of the Seventh Day Adventist Church.

Neither of the Grahams had a license to practice medicine. Ellen was, however, licensed as a registered nurse.

The Grahams professed to be followers of Ellen G. White, who is esteemed as a prophet by the Adventists. Sister White advocated the use of herbs and other natural substances to assist God in healing the sick. Many of her writings promote the internal and external application of pure water. She discredited the use of drugs. However, the evidence is that the Seventh Day Adventist Church does not encourage its members to reject medical care.

The Grahams operated an establishment called "Hoosier Health House", which catered primarily to those seeking a

naturopathic form of health care. The Grahams also sold vitamins, minerals, health food and equipment for processing health food. The Hoosier Health House also offered numerous publications and pamphlets advocating "natural" cures to various diseases, including cancer.

Sybil Bennett was in her fifties. She had been consulting a physician named Dr. VanNess. A lump appeared in Sybil's breast. Sybil's husband thought Dr. VanNess was looking after it.

However, Sybil went to the Hoosier Health House on June 2, 1983, complaining of a pain behind her eyes, a chronic cough, and physical weakness. It is not clear that the Grahams then had any knowledge about the breast lump, which by that time or soon afterward progressed to an open lesion.

After a preliminary examination, which included urine and saliva tests, Harry devised a program to treat Sybil's ailments. This program included nutritional supplements, fomentations (*i.e.*, a hot or cold compress applied to the skin to stimulate circulation), enemas, and colonic irrigations (the last is similar to an enema, but involves use of water under pressure introduced into the colon). On some days, the Grahams gave Sybil as many as eleven enemas employing coffee, carrot juice, aloe vera, castor oil, or pure water. Sybil would usually spend all day with the Grahams, with her husband dropping her off before work and picking her up in the afternoon. Frequently, she stayed overnight at the Grahams'.

The Grahams billed Sybil for these services in an amount totalling at least $7,000.00.

Sometime after Sybil started this regime at the Hoosier Health House, she showed the Grahams the open lesion on her breast. Sybil's husband thinks this happened in the second or third week Sybil went to the Grahams. Ellen Graham immediately recognized that Ellen was potentially suffering from breast cancer.

At Harry Graham's suggestion, Sybil requested him to set up an appointment with a Dr. Goldberg of Dayton, Ohio. Dr. Goldberg was an osteopathic physician, licensed in Ohio but not in Indiana. After conducting a biopsy, Goldberg concluded that Sybil was in fact suffering from breast cancer.

The Grahams and Mr. and Mrs. Bennett discussed the situation. The Grahams told Mr. Bennett that they were going to treat the lesion on Sybil's breast and that they thought they could cure it. The Grahams told Bennett that Dr. Goldberg could get the substance known as "Laetrile", which some contend has some efficacy in treating cancer but others contend is unproven. Goldberg in fact prescribed Laetrile and instructed Ellen to administer injection of it. In addition to giving the injections (in Indiana), the Grahams continued to give Sybil nutritional supplements, enemas, and colonic irrigations.

During this time, Bennett pleaded with his wife almost daily to go to a medical doctor, which Sybil refused to do. Bennett also frequently talked to Harry Graham about getting other advice or help because Sybil wasn't getting any better. During this period of time, on several occasions when Bennett made his pleas for Sybil to accept conventional treatment, Ellen told Sybil that "they [conventional physicians] would just cut you up."

In late July, the Grahams recommended that Sybil get all her teeth pulled because they were bad and they said the teeth had to be removed to effect a complete cure because there was a lot of poison going into her body. This extraction required three trips to South Bend, Indiana, about a hundred miles each way from the Delaware County location of the Hoosier Health House, where the dentist recommended for the purpose by the Grahams was located.

Sybil's physical condition continued to decline. Jack Bennett contacted a physician, Dr. Suer, about examining her. Dr. Suer said he could treat Sybil if she would come in without being forced.

On the same day, August 19, 1986, Jack Bennett took a friend of Sybil's, Gail Heiland, to visit Sybil at the Grahams, where Sybil was now staying several days at a time. Ms. Heiland described the place as not clean, but not filthy. She noted the posters on the walls promoting certain views on health, particularly one showing a man without fingers, intimating that if people took medical drugs they would lose their fingers. During this time, Sybil was given audio tapes to listen to, such as tapes on colonics, tapes about how the narrator had purportedly cured herself of cancer with colonics and enemas, and tapes of religious songs.

On August 24, 1983, Harry Graham called Jack Bennett and said Jack had better get Sybil. Bennett, his sister, and Gail Heiland got her. Sybil was then very weak, she could hardly walk, and her breathing was very shallow. They took her directly to Dr. Suer's office. Sybil was so weak that she could not make it into the office, so the doctor examined her in the back seat of the car. He immediately had her placed in Ball Memorial Hospital in Muncie. He observed that she was in respiratory distress and slipping in and out of consciousness.

At the hospital, she was placed on a respirator immediately. Initially, she was treated for heart failure, lung cancer, sepsis, and the breast cancer, which was then found to have metastatized to the lung. Sybil also suffered from lack of oxygen in her blood, pulmonary edema, and an eletrolyte imbalance. Dr. Suer felt that the heart failure might have resulted from toxic levels of potassium contained in Sybil's system. As part of the nutritional program devised by the Grahams, the Grahams had administered potassium.

Soon, Sybil's breathing improved greatly. It became clear to the physicians that her entire problem was due to the metastatized cancer. The only reasonable hope she had was chemotherapy. But by the time she reached the hospital, she was too weak to withstand chemotherapy.

Without the option of chemotherapy, the physicians were forced to let the disease run its course. She was doomed before she came to the hospital. Dr. Suer attempted to interview Graham concerning the treatment she had received at the "Hoosier Health House." It was difficult to get information from Graham, Suer said. Graham gave Dr. Suer some information about Sybil's "treatment", but he withheld any mention of the use of Laetrile. If Dr. Suer had known about the Laetrile (which happens to contain amounts of cyanide), it might have made a difference in the physician's diagnosis: they would have entertained the possibility of Laetrile intoxication.

About three weeks after being admitted to the hospital, Sybil Bennett died, on September 11, 1983. The immediate cause of death was respiratory failure. There was no need of an autopsy to determine the reason: the underlying cause of death was the breast cancer which had metastatized to the lung.

Testimony by Dr. Suer was that the Grahams did nothing to actually aggravate the cancer. But several enemas or colonics each day could weaken a person, because the colon contains many basic fluids and electrolytes. However, the use of potassium pills probably did have a harmful effect because the potassium level was so high when Sybil was admitted to the hospital that it was in fact toxic, and was part of what was wrong with her heart rhythm. Furthermore, the Grahams had an impact on the cancer in delaying Sybil's getting to chemotherapy, said Dr. Suer.

Dr. Suer also testified that there was no medical treatment or nutritive value to an enema or colonic, aside from the limited purpose of unclogging impacted fecal matter. (Enemas can be used for diagnostic purposes, such as barium enemas, and for cleaning the bowel for examination.)

The medical testimony was also that if Sybil had been strong enough to tolerate the chemotherapy, she would

have had an 80% chance of living longer, even with the stage of cancer that afflicted her. According to statistics, with chemotherapy she would have had a 36% chance of remission lasting a full five years, and an 80% chance of surviving for 17 months.

SUMMARY OF THE ARGUMENT

I. Indiana's Medical Licensing statute is not unconstitutionally broad since its terms are sufficiently precise to give a person of average intelligence due notice to conform his conduct to its requirements.

II. The search warrant was proper since there was sufficient evidence to show the magistrate the reliability of the information establishing probable cause for its issue.

III. & IV. The Indiana court decided the contended issue on the basis argued by Appellants. Petitioners have construed a preliminary discussion of a legal term of art ("variance" as it relates to difference between the crime charged and the facts proven) with the conclusion on the issue of admissibility of evidence. There is no showing that the evidence was prejudicial, and it was relevant. The elapsing of time between the offense and the collecting of this evidence affected only its weight and credibility, not its admissibility. Petitioners do not set out a federal claim on these issues.

V. Petitioners claim only that the Indiana courts interpreted contrary to their own prior opinions, thus not raising a federal question. In fact, the decision was in accordance with Indiana precedent.

VI. No federal question is alleged in this objection that Petitioners were entitled to a particular instruction; furthermore, the evidence established the defense intended by the instruction was not available.

VII. & VIII. Petitioners did not raise First Amendment "exercise of religion" issues in the Indiana appellate courts.

and these issues should not be determined at this stage, since they were not "pressed or passed upon" below.

IX. The trial court issued judgment and imposed punishment on either Pettioner only on one of the homicide counts, thus "merging" the other verdict. Since Petitioners were not subject to multiple punishment for the same offense, no Double Jeopardy violation occurred.

X. Petitioners allege no federal question connected with the lack of an autopsy on deceased, and did not press their issue below. The factual situation does not show prejudice as a result of lack of this evidence, nor is any specific prejudice advanced.

ARGUMENT

I.

THE STATUTE DEFINING UNLAWFUL PRACTICE OF MEDICINE IS NOT UNCONSTITUTIONAL

Appellants were convicted of unlawful practice of medicine, Indiana Code 25-22.5-8-1:

> "It is unlawful for any person to practice medicine or osteopathic medicine in this state without holding a license or permit to do so, as provided in this article."

The term "practice of medicine" is defined as follows in Indiana Code 25-22.5-1-1.1(a):

> "(1) Holding oneself out to the public as being engaged in the diagnosis, treatment, correction or prevention of any disease, ailment, defect, injury, infirmity, deformity, pain or other condition of human beings, or the suggestion, recommendation or prescription or administration of any form of treatment, without limitation, or the performing of any kind of surgical operation upon a human being, including tattooing, or the penetration of the skin or body orifice by any means, for the intended palliation,

relief, cure or prevention of any physical, mental or functional ailment or defect of any person;

(2) The maintenance of an office or place of business for the reception, examination or treatment of persons suffering from disease, ailment, defect, injury, infirmity, deformity, pain or other conditions of body or mind; or

(3) Attaching the designation 'doctor of medicine,' 'M.D.,' 'doctor of osteopathy,'; 'D.O.,' 'osteopathic medical physician,' 'physician,' 'surgeon,' or 'physician and surgeon,' either alone or in connection with other words, or any other words or abbreviations to his name, indicating or inducing others to believe that the person is engaged in the practice of medicine or osteopathic medicine as herein defined."

The Appellants present their claim for relief in this section of argument on the premise that the Indiana appellate courts erroneously decided a new question of law. Formally speaking, they seem to be using legal phraseology more properly invoked in petitions for the Indiana Supreme Court to transfer cases decided by the lower appellate court in the State. However, it is clear from context that they are actually presenting a challenge based on a Fifth Amendment Due Process contention that the cited statute is vague.

Due process requires that statutes prohibiting certain conduct be clearly defined. A statute using terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Grayned v. City of Rockford*, 408 U.S. 104 at 108, 97 S.Ct. 2294 at 2298, 33 L.Ed.2d 222 at 227 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 337 (1974).

However, Appellants themselves provide examples from the trial record of a witness, a registered nurse, testifying as to conduct which she understands from the statute is prohibited to her, absent a physician's orders. In addition, they

hypothesize several types of conduct which they assert would violate the statute and which they believe it would be illogical to consider violations. They seem to conclude that because such conduct should not be (in their view) subject to criminal liability the statute is vague. This is not a valid test for vagueness. The test is whether the statute adequately informs people of ordinary intelligence what conduct is proscribed. *Grayned, supra.*

The cited statute in fact gives detailed guidance as to what is considered the practice of medicine. In essence, it prohibits, among other things, operating a place for the business of examining and treating people suffering from ailments, diseases, etc; holding oneself out to the public as being engaged in the diagnosis and treatment of ailments, diseases, etc; and penetrating the skin or bodily orifice for the intended palliation, relief, cure, or prevention of ailments or defects. (The Indiana Court of Appeals has held that the clause beginning "...for the intended palliation, relief, cure, or prevention..." modifies only the verb phrase "...penetration of the skin or body orifice..." *State ex rel Medical Licensing Board v. Brady*, Ind. App., 492 N.E.2d 34, at 37 *et seq* (1986).

Petitioners omit to mention that the same statute also further defines some of the terms used in the sub-section defining "practice of medicine." Indiana Code 25-22.5-1-1.1(c) provides in relevant part that: "'Diagnose or diagnosis' means to examine a patient, parts of a patient's body, substances taken or removed from patient's body, or materials produced by a patient's body to determine the source or nature of a disease or other physical or mental condition..." It provides in Indiana Code 25-22.5-1-1.1(f) that "'prescribe or prescription' means to direct, order or designate the use of or manner of using, a drug or medicine or treatment, by spoken or written words or other means."

This further definition shows that some of Petitioners' illustrations are ill-taken. Contending that tobacco use

causes cancer is not "diagnosis" by any reading of the statute. Nutrition and such activities associated with nutrition as feeding, or the suggesting that certain foods or diets are, in general, healthful are not included in the definition of "prescribe or prescription", which as written and as understood by persons of ordinary intelligence means to direct a particular person's course of treatment pursuant to his individual examination. Health food proprietors thus are not prevented from extolling the virtues and qualities of their stock, although they might be prevented from recommending use of a particular product or group of products as a cure for an individual customer's health complaints, or holding out their wares as a substitute for medically-recognized treatment. Massage, so long as it does not purport to have a purpose to treat disease, is not included in that statute. (Early in the history of medical licensing in Indiana, after enactment of the State's first statute to this purpose in 1897, the State Attorney General issued an opinion to this effect. Opinion of the Attorney General of Indiana 1899-1900, p. 107.)

Under a predecessor statute very similar in its provisions to the current law (Ind. Stat. Ann 63-1311, Burns 1951), the Supreme Court of Indiana held that the purpose of the statute was "to protect people afflicted with diseases or illness in any degree from their own credulity." *Dean v. State ex rel Board of Medical Registration and Examination*, 233 Ind. 25, 116 N.E.2d 503 (1954).

A person of ordinary intelligence can readily ascertain that the legislature intended to proscribe any unlicensed person conducting himself as a healer (through physical means; healing through prayer is not affected) curer, or preventer of medical or functional ailments, if that person diagnoses through examination, or prescribes drugs or medicines, or performs surgery, or operates a business-place for examination or treatment, or engages in forms of cure, prevention, or relief by any means which involves invasion of the body through the skin or a body orifice. The

harm intended to be prevented by this statute is clear. It is not the layman's occasional removal of a splinter, or advising a friend to get food or rest. The danger is that a person unqualified to do so will promote himself into a position of unjustified trust such that other people will follow his bad advice or submit to an unwise or unskilled course of physical treatment.

Most persons who have had a splinter might allow a lay person to remove it with a needle (as long as his hand was steady and he did not pierce too deeply) and allowing this to happen is not likely to do harm. But few would allow a person to remove, say, an appendix unless convinced that he had knowledge and skill to do so. Likewise, most persons can take for what it's worth a well-meaning lay friend's suggestion that what is needed is carrot juice, or a vegetarian diet, or lots of Vitamin C for a cold. But where a person presents himself as some sort of knowledgeable health professional and prompts the taking of a certain drug or certain diet, or conducts certain invasive treatment, and puts this forward as a cure for a specific illness, a sufferer has less critical defenses. His ability to rationally consider the treatment is overborn by the clothing of expertise the unlicensed practitioner has donned. This is particularly true when the "treatment" proposed seems to offer a way to avoid more unpleasant (but medically sound) treatment.

If the statute is read as statutes should be, considered as a whole in light of its purpose and with the terms used therein given their ordinary and usual meanings, it provides clear guidance. Petitioners have not established that it does not give adequate definitions of the prohibited acts such as to allow a reasonably intelligent person to conform to its requirements. They have, accordingly, not demonstrated any entitlement to relief.

(The Grahams conclude this section of argument with an observation concerning potassium levels and inferences to be drawn therefrom which is not directed to the basic

contention of the argument. Respondents will address all cognizeable issues concerning sufficiency of the evidence in the appropriate argument section.)

II.

THE SEARCH WARRANT IN THIS CASE WAS NOT IMPROPERLY OBTAINED

Here Petitioners quarrel with the judgment of the State courts that probable cause was made out to support issuance of a search warrant whereby officers visited their "Hoosier Health House" and obtained physical evidence.

A magistrate's determination of probable cause to issue a search warrant should be given great deference by reviewing courts. The traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis" for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed 2d 527 (1983), which reaffirmed that "traditional rule." The task of the issuing magistrate is to make a practical, common-sense determination whether, given all the circumstances put before it, including the "veracity" and "basis of knowledge" of the persons attesting to the situation, there is a fair probability that evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed. *Gates, supra*, 462 U.S. at 238, 103 S.Ct. at 2332.

Here, these requirements were clearly met. The persons providing the information upon which the warrants were requested were the deceased's husband, Jack Bennett, and the friend, Gail Heiland, who had been present at the "Hoosier Health House" premises, who had been to those premises and seen some of the conduct which was being investigated. They were not paid informants, but coopera-

tive citizens relating possibly criminal conduct which they had witnessed. They were speaking from first-hand knowledge. The issuing magistrate was in a position to assess their knowledge and veracity. The circumstances meet the practical traditional test of establishment of a substantial basis to conclude that probable cause existed. Thus, there is no showing of any constitutional violation in in issuance of the search warrant.

III. and IV.

IT WAS NOT IMPROPER TO HOLD THAT AN APPELLATE CONTENTION CONCERNING THE INTRODUCTION OF CERTAIN EVIDENCE WAS WAIVED BY USE OF A DIFFERENT BASIS FOR OBJECTION AT APPEAL THAN THE BASIS MAINTAINED AT TRIAL

In this instance, Petitioners are disputing the admission of pictures taken inside their "Hoosier Health House" over a month after Sybil Bennett was last treated there. They frame this issue in terms of what they call the Indiana appellate courts' refusal to consider this issue. This section of the State's response addresses both sections III and IV of their argument section.

The State would contend that the Grahams misunderstood the nature of the Indiana Court of Appeals discussion of the issue. They seem to believe that that court merely evaded the actual issue, and note that the appellate opinion used the term "variance" to cover the substance of a trial objection.

The term "variance" here is used to denote a difference between the facts charged and the proof adduced at trial. At trial, the objection was that the evidence was irrelevant.

The Court of Appeals did not evade discussion of the actual contention. It merely pointed out that no contention of a "variance" as understood by the usage above was made at any stage. "They complain, rather, that in addition to the

evidence admitted which directly supported the charge against them, evidence of acts not specifically alleged in the information was improperly introduced." 480 N.E.2d at 992.

The appellate court thus did no more here than properly identify the nature of the objection as an irrelevancy objection rather than a contention of variance. The court concluded that the Appellants did not set out the existence of a variance between the crime charged and the actions proven at trial, then addressed the contentions of irrelevance on the merits. It discussed why certain evidence was, in fact, relevant. 480 N.E.2d 981.

Then it moved to a discussion of the introduction of the pictures and testimony tending to show the appearance of the Hoosier Health House in late September, 1983, which is the only evidentiary matter discussed in this section of Petitioner's arguments. This the Court of Appeals termed "a second contention which is closely related to the issue of variance." 480 N.E.2d at 992-993. "The evidence challenged here includes the evidence which the Grahams contended was at variance with the charges ... [,] the definition of quackery ..., [and] testimony and photographic evidence which depicted the condition of the Hoosier Health House on September 30, 1983, more than one month after Sybil last received treatment at the Grahams' establishment. They assert on appeal that this evidence was irrelevant and unduly prejudicial." *Ibid.*

Thus, the Grahams are in error in their Petition for Certiorari when they contend that the Indiana Courts merely brushed off their appellant argument on a technicality based on counsel's framing the issues in terms of variance. In fact, one group of this evidence was assessed in terms of the trial objection that they were irrelevant, immaterial, or unduly prejudicial, in spite of counsel's use of the term "variance." The other group was held to have been objected to on appeal as irrelevant and unduly prejudicial.

The appellate court did not discuss their relevance, not because of a technical difference in basis of objection, but because whether they were relevant or not and hence properly admitted or not, no demonstration of prejudice was made.

Thus, far from being dismissed on a technicality, the Appellants' contentions of error in connection with the admission of this evidence was considered and discussed on the merits. *See* 480 N.E.2d at 993.

The question considered was the essential component of any error, whether any prejudice or harm was demonstrated. The Court of Appeals concluded that "[the Grahams] merely assert that the allegedly erroneous admission of this evidence substantially prejudiced their rights ... The Grahams have failed to make any coherent argument which specifically explains how these alleged errors resulted in significant prejudice. Therefore, we must conclude that any error which might have occurred as a result of the admission does not warrant reversal." *Ibid.*

The instant action is maintained under 28 U.S.C. §1257, which describes the certiorari jurisdiction of this Court, allowing review by writ of certiorari where there is a claim "under the Constitution, treaties, or statutes of ... the United States." Neither here nor in their appellate court briefs did Petitioners set up any federal claim. In fact, they repeat the same situation which was confronted by the Indiana courts, by failing to establish or even assert the existence of any particular prejudice. It is a common sense requirement that courts must at least be told the nature of the harm which befell a petitioner before they can act to redress such harm. To successfully invoke the certiorari jurisdiction (or, in a less restrictive analysis, to successfully overcome the prudential restriction made by this Court in certiorari cases) of this Court, such an allegation of harm must also show the federal claim involved. A petitioner must also show that the federal question was presented to the lower court. *Illinois v. Gates, supra.* In addition to not

alleging any particular prejudice, they made no federal claim at all in these argument sections. They make nothing more than a bald contention that the evidence involved was "blatantly prejudicial."

They have had many opportunities to advance the alleged prejudicial nature of admission of this evidence, and have refrained from doing so. It can fairly be concluded that there is no articulable prejudice involved, let alone any sort of prejudice which violated any federal entitlement.

Indiana law allows evidence of other criminal activity that may be admissible to prove, among other things, knowledge, intent, or a common scheme or plan from which the accused originated the charged plan. *Woods v. State*, Ind., 471 N.E.2d 691 (1984). As to the evidence about the appearance of the Grahams' place on September 30, any objection that time had passed between the last presence of Sybil Bennett there and the gathering of the pictures or descriptions might go to the weight of the evidence, but as this evidence still tended to prove or disprove some issue of fact, they were relevant and admissible under Indiana law. *Armstrong v. State*, Ind., 429 N.E.2d 647 (1984). There is no dispute that the scheme or plan to operate the "Hoosier Health House" in much the same manner as it was operated when Sybil Bennett was there continued to the time the descriptive evidence was gathered. Federal law has allowed admission of evidence concerning an ongoing operation for a much longer period of time than this. *United States v. Stump*, 735 F.2d. 273 *cert. denied*, ____ U.S. ____, 105 S.Ct. 203, 83 L.Ed.2d 134 (1984).

In summary, the evidence complained of in the Petition was not irrelevant, and was not imporerly admitted; the appellate courts did not dispose of the issues presented in connection therewith in any improper manner, no prejudice was alleged or shown, and no federal right whatever is implicated or contended to be implicated in this issue.

For this multiplicty of reasons, then, no entitlement is shown for relief in Issues III or IV of the instant Petition.

V.

NO BASIS FOR RELIEF IS SHOWN ON THE BASIS OF THE INSTRUCTIONS GIVEN BY THE TRIAL COURT

Petitioners ground their argument no. 5 on the contention that the trial court's instructions, and the Indiana appellate court's declining to grant relief because of the content of the instructions, constituted an erroneous decision of a new question of Indiana law. Their contention here is, patently, therefore a contention of a state question, and not a federal question at all. There is not even the baldest assertion that the decision was erroneous on some federal standard. Since no federal question is presented, the Petition should be denied. *Illinois v. Gates, supra*; 28 U.S.C. Sec. 1257.

The actual contention made here is that Indiana law required an instruction that in order to show homicide the state must show that the defendants "inflicted or caused to be inflicted an injury upon the victim which was a direct and proximate cause of death." All of their authority, both in their state court brief and presently, that that was an exclusive and required statement under Indiana, derives from instructions approved in cases in which the facts involved infliction of an injury. Thus, it was appropriate for the courts to discuss their cases in such terms, and the evidence supported instructions drawn in such terms.

Here, however, the facts were otherwise. The Indiana Court of Appeals in its decision on this case cited several cases and four volumes of legal scholarship to support the instruction that was actually given. This citation shows that under Indiana law the trial court's instruction on this issue was proper: in order to sustain its burden in homicide prosecutions of establishing causation, the State need only show that the defendants' conduct contributed mediately or immediately to the death of another person. *Powell v. State*, Ind., 437 N.E.2d 969 at 971 (1982).

Thus, there is not even a colorable claim that the Indiana courts in this case altered Indiana law or decided new law, let alone that they did so erroneously.

VI.

THERE IS NO BASIS FOR RELIEF SHOWN IN THE DENIAL OF A TENDERED INSTRUCTION

Here the Grahams repeat a contention that they were entitled to have the jury instructed concerning the provisions of the Nurses' licensing statute. They defended their actions on the basis that Ellen Graham was a licensed registered nurse, and that Harry was operating pursuant to her instructions.

Again, they make no federal claim, and thus the Petition is subject to denial either on the basis of failure of jurisdiction or for failing to meet this Court's prudential requirement that a federal basis exist that was "pressed and passed upon below." *Illinois v. Gates, supra.*

In addition, their own argument practically concedes the lack of merit of this contention. It says that Ellen raised the contention that "some of her conduct — if not all — was part of a nursing regimen." (page 37)

The Indiana Court of Appeals decided the issue on the basis that persons are not entitled to an instruction that is not applicable to or supported by facts in the record. *McDonald v. State*, 264 Ind. 477, 346 N.E.2d 569 (1975). As the Court of Appeals pointed out, the Grahams were not charged with unlicensed practice of nursing, and were not entitled to an instruction on that statute in the context of defining the offense charged. On the merits of a possible defense from the charge of unlicensed practice of medicine based on a contention that certain of their acts constituted nursing, the Court of Appeals noted that there was no evidence presented that a licensed nurse could, without authorization by a physician licensed in Indiana, inject Laetrile (or any other drug or purported drug) or perform

enemas or colonic irrigations. The Court of Appeals did note that Ellen presented evidence that nurses were authorized, and it was common nursing practice, to perform "fomentations." But this was only part of the conduct charged. There is no basis on which to claim that they were entitled by the nursing statute to diagnose Sybil's condition (either the heart condition she initially approached them for or the "ulcer" that developed that turned out to be breast cancer) or to prescribe and execute the course of treatment involving many and varied sorts of enemas and colonic irrigations, or the injections. (The State did not base its case on the identity of the substance used, Laetrile.)

Since there was no defense, not even a weak and inconsistent one, that could be postulated on the nursing statute, then pursuant to *Harrington v. State*, Ind. App., 413 N.E.2d 622, *trans. denied* (1980), the Grahams were not entitled to an instruction on that basis under Indiana law.

VII. and VIII.

THERE IS NO ISSUE OF VIOLATION OF FIRST AMENDMENT RELIGIOUS RIGHTS

In these two argument sections, the Grahams assert their adherence to a religious faith concerning health and healing stated by a founder of the Seventh Day Adventist Church named Ellen G. White. In fact, they claim a purer adherence to this faith than many leaders and medical doctors who are members of the church. The State would not presume to gainsay their faith or to assert that they are bound to limit the application of this faith to the extent these church leaders are said to allow them to limit it.

If this issue were to be addressed on its merits, though, the State would be constrained to point out that the Grahams are not talking about their right to order their own health treatment according to their view of Sister White's writings. They instead assert Sybil Bennett's un-

doubted right to exercise her religious beliefs. However, this is a personal right, and they cite nothing to establish that they are entitled to assert it on behalf of a third person, or that it conferred any rights upon them. They also transform their assertion of personal right to religious belief into an unfounded claim that their religious faith gives them a privilege to perform *upon others* acts constituting the practice of medicine.

However, the issue cannot be addressed on the merits. It was not even raised on appeal to the Indiana Court of Appeals, and was not considered by that Court in its opinion.

As noted above, the so-called "not pressed or passed upon below" rule has recently been reaffirmed by this court in *Illinois v. Gates, supra*. As *Gates* restated, due regard for the appropriate relationship of this Court to state courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials. 462 U.S. at 221, 103 S.Ct. at 2323. The Petitioners have not pressed this claim of infringement of religious rights, nor, consequently, have the courts of Indiana passed upon it. Therefore, the court should decline to consider relief on this basis.

IX.

THERE WAS NO DOUBLE JEOPARDY VIOLATION

Petitioners complain because they were each tried on two counts of homicide for Sybil Bennett's death. This, again, is an issue that was not "pressed or passed upon" in the Indiana appellate court system. Therefore, pursuant to *Illinois v. Gates, supra*, it should not be considered by this Court.

Actually, Petitioners' claim here simply represents a lack of understanding of the application of the Double Jeopardy Rule.

The Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, prohibits three things: reprosecution for the same offense after an acquittal, reprosecution for the same offense after a conviction, and multiple punishment for the same offense. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *North Carolina v. Pierce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969). This rule does not prevent prosecution on multiple duplicative counts at the same trial where the trial court imposes judgment so as to avoid cumulative punishment for the same offense. The rule of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct., 75 L.Ed. 306 (1932) is that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one [for double jeopardy purposes], is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304, 52 S.Ct. at 182.

In cases where the offenses proven at trial do not pass the *Blockburger* test and therefore a defendant cannot be subjected to separate punishment for them, it is proper to withhold judgment on the lesser offense, and punish only for the greater offense. This process in Indiana has become known by the term "merger", although historically this term had a somewhat different meaning. *Elmore v. State*, Ind., 382 N.E.2d 893 (1978).

In this case, the trial court concluded that the offenses of Reckless Homicide and Involuntary Manslaughter were identical, and did not enter judgment or impose punishment for Involuntary Manslaughter. Thus, the Grahams stand punished only for Reckless Homicide, notwithstanding the fact that the jury returned a verdict also for involuntary manslaughter. Since they are not subjected to multiple punishment for the same offense, the provisions of the Double Jeopardy Clause have not been violated.

X.

THERE IS NO ERROR IN FAILING TO PERFORM AN AUTOPSY

The State of Indiana can find no issue raised at the Indiana appellate courts relating to the fact that an autopsy was not performed on the deceased. Hence, insofar as it can even be said that a coherent issue is raised in the Petitioners' short paragraph, it should not be considered because not "pressed and passed upon" in the state courts. *Illinois v. Gates, supra.*

The reason Petitioners' argument cannot be said to raise a coherent issue is that it is nothing more than a trio of rhetorical questions: why did the Coroner not perform an autopsy (Obviously, the State responds because there was no doubt she died of the cancer which had metastatized to her lung), and was that not a breach of his duty (No, because the death was not unexplained), and wasn't that a violation of Petitioners' rights? (But Petitioners are silent as to what rights they think are involved.) If anything, absence of post-morten evidence, which in circumstances of this case might have included autopsy photographs showing the cancer, weakened the State's case, if it had any effect on either party's case.

In Indiana, reckless homicide in Indiana is a general intent crime which involves choosing a course of action either with knowledge of the serious danger to others involved therein, or with knowledge of facts which would disclose the danger to any reasonable man. *Salrin v. State*, Ind. App., 419 N.E.2d 1351 (1981). Reckless homicide can result from an act or omission that causally results in death, where such conduct or omission was voluntary, and the conduct and the conduct or omission was reckless and not merely negligent: that is, where it was both a conscious disregard of the harm that might result, and a substantial deviation from "acceptable standards" of conduct. *Slusher v. State*, Ind. App., 437 N.E.2d 97 (1982).

Here, there was no doubt of the cause of Sybil Bennett's death, and an autopsy would have cast no significant new light upon it. Petitioners' main contentions at trial and on appeal were that there was a lack of the necessary causal connection, and that their conduct was not reckless. There is no suggestion, now or in prior stages of this litigation, as to how the Coroner's decision not to conduct an autopsy unduly prejudiced Petitioners' ability to present this defense.

Indiana's courts have painstakingly excluded the possibility of homicide conviction for death through mere negligent omission, but have allowed homicide prosecutions where breach of a legally imposed duty rising to the level defined in *Slusher, supra*, has resulted in death.

Indiana's statutes impose upon all unlicensed persons the duty to refrain from practicing medicine. As argued elsewhere, one of the reasons this duty is imposed is to prevent persons from inducing an afflicted and thus vulnerable sufferer from pain or serious illness, from placing trust in someone unqualified to give treatment.

The State maintained in the Indiana courts, and presented evidence, that the Petitioners performed acts constituting the Unlawful Practice of Medicine, and that they knew some weeks before they ceased "treating" Sybil Bennett that she suffered from cancer with a prominent visible lesion, progressive weakening, increasing loss of sight in one eye, and what they themselves "diagnosed" as "cardiac arrest" (but which seems from properly admitted evidence to have arguably been the result of an easily remedied potassium imbalance). The Grahams, in their instant brief, point to some evidence which they believe disputes this conclusion, but the choice among contradictory evidence, if contradictory the evidence be in the case, was up to the factfinder at the trial level.)

Nevertheless, they not only "treated" her but prevailed upon her to avoid conventional medical treatment. There is

evidence that they immersed her in tape-recorded purported testimonials about "cancer cures" through colonics, that they displayed frightening posters about the evils of standard medical treatment, and that they directly played on her fears by advising her that regular physicians would just "cut her up."

To some degree, this conduct of Petitioners' seems to have been of commercial motivation. The "Hoosier Health House" was their businessplace, and the evidence was that they charged Sybil at least $7,000.00 for the treatments she received over a two and a half month period in their establishment.

There was evidence that medical chemotherapy treatment of Sybil Bennett would likely have resulted in her living much longer than she did, with a good chance of a full five-year remission of the cancer. By failing to obey their legal duty to avoid Unlicensed Practice of Medicine, Petitioners actively prompted Sybil to delay any recognized effective medical treatment.

Furthermore, there is uncontradicted evidence that the incredible number of enemas and colonics the Petitioners administered drained the body of fluids needed to maintain proper chemical and electrolytic balances. The result of this, as testimony showed, was that Sybil was weakened to the extent that chemotherapy was never available to her once she did come under licensed physicians' care.

There is not even speculation as to how the performing of an autopsy to confirm the clearly-understood cause of death could conceivably impact upon any of this evidence.

Petitioners have not presented any cognizeable issue connected with the lack of an autopsy in this record.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issues alleged by Petitioners have been correctly disposed of in conformity with the opinions of this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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